Nikhyl Sud

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EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- GPA: 3.56
- Mock Trial, 1L & 2L Captain, 2021 UVA Law Trial Advocacy Competition Finalist
- William Minor Lile Moot Court Competition
- *Virginia Law & Business Review*, Senior Editor
- South Asian Law Student Association

University of Pittsburgh, Pittsburgh, PA
B.S., Economics (Minor: American Politics), with Honors, *magna cum laude*, April 2018

- Mock Trial, Vice President
- Academic Resource Center, Tutor
- Communication Department Speech Lab, Speech Coach

EXPERIENCE

Covington & Burling LLP, New York City, NY
Summer Associate, May 2023 – Present

United States Attorney's Office, Concord, NH
Intern, May 2022 – August 2022

- Conducted comprehensive legal research and drafted memoranda examining 4th Amendment motions to suppress evidence, electronic discovery, jurisdictional components of federal statutes, and evidentiary hearings, among others
- Authored a successful pre-trial detention motion
- Aided in trial and appellate argument preparation

Teach for America, Tulsa Public Schools, Will Rogers College Jr. High School , Tulsa, OK
7th Grade Math Teacher/Team Lead, July 2018 – July 2021

- Planned and delivered lessons, reviewed assignments and examinations, provided oral and written feedback to students
- Created math lesson plan bank for current and future staff
- Helped students achieve an average of 1.4 years of academic growth in final year
- Founded and coached school's mock trial team
- Selected as Teacher of the Month by Tulsa Community in Schools in January of 2019

Federal Home Loan Bank, Pittsburgh, PA
Community Investment Intern, April 2017 – August 2017

- Analyzed and summarized community lending and affordable housing policy
- Assisted in development of bank's "Blueprint Communities" initiative, targeting funding to over 50 low-income communities in the Pittsburgh and Philadelphia areas

Office of the Governor of New Hampshire, Concord, NH
Legislative Intern, April 2016 – August 2016

- Drafted mailings to constituents regarding public policy developments
- Attended, summarized, and analyzed state legislature hearings for governor's policy advisors

HOBBIES & INTERESTS

Hiking, jazz, doubles tennis, chess, slow-pitch softball

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Nikhyl Sud

Date: June 07, 2023
Record ID: wrk9wc

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	A-	Johnston,Jason S
LAW	6003	Criminal Law	3	B+	Frampton,Thomas Ward
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B+	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Solum,Lawrence
LAW	6104	Evidence	3	A-	Schauer,Frederick
LAW	6113	Intro to Law and Business	2	B+	Geis,George Samuel
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	A-	Johnson,Alex M
		FALL 2022			
LAW	9077	Asian Amer and the Law	2	B+	Law,David S.
LAW	8004	Con Law II: Speech and Press	3	A-	Schauer,Frederick
LAW	7179	Race and Criminal Justice	3	A-	Bowers,Josh
LAW	9081	Trial Advocacy	3	A-	Livingston,Ronald L
LAW	8018	Trusts and Estates	3	B+	Cahn,Naomi Renee
		SPRING 2023			
LAW	7019	Criminal Investigation	3	A	Armacost,Barbara Ellen
LAW	7184	Innovating for Defense	3	A-	Nachbar,Thomas B
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7078	Remedies	3	A-	Laycock,H Douglas

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am very pleased to recommend Nikhyl Sud for a judicial clerkship. I am the Mortimer M. Caplin Professor of Law and the Director of the Center for the Study of Race and Law at the University of Virginia. I teach and write principally in the areas of Constitutional Law, Racial Justice and Law, Employment Discrimination and Disability Law. I am honored to have served as a judicial clerk to the Honorable Cornelia G. Kennedy of the United States Court of Appeals for the Sixth Circuit (1993-'94).). As you likely well know, the University of Virginia is one of the most competitive law schools in the country with a student body of outstanding quality.

Nikhyl was in my Race and Criminal Justice course in the fall of 2022. a course I co-taught with a colleague. The class was a discussion-based seminar with just ten students so I had the opportunity to interact with and observe Nikhyl frequently. He was always well prepared and actively engaged, offering insightful questions and observations about the issues under discussion. He also came to office hours to follow up on class discussion and to discuss his idea for his final paper. That paper, titled "A Ticket to Failure: Why Students Deserve More Due Process Rights in the Face of School Suspensions," persuasively argued that the harm of short-term school suspension is underappreciated and warrants greater procedural protections. The paper was carefully researched and written, demonstrating creative and plausible arguments drawn from a variety of legal and empirical sources. He received an A-. I would note that the law school imposes a strict B+ mean on all courses so an A- is identifiably above average. Moreover, awarding 'A' grades is difficult in small courses as the mean typically requires offsetting each A with a B- or two B's.

Outside of class, Nikhyl has contributed much to the law school community. While I will let his resume speak for itself, I highlight his leadership, teaching and oral communication skills that can be traced back to his time as an award-winning teacher before law school. Nikhyl currently serves as captain of the mock trial team. He leads team practices and instructs members on how to deliver witness examinations and respond to objections. He has litigated several cases before mock juries, demonstrating his ability to think on his feet and communicate his ideas succinctly. In fact, the mock-trial team that Nikhyl led during his 1L year made the finals of the 1L Trial Advocacy Tournament.

I highly commend Nikhyl's character and personality. In class, he engaged with other students on sensitive and controversial racial issues with concern, respect and empathy. He has a disarming manner that encourages others to be candid and authentic. I very much enjoyed his visits to my office hours. I was moved by his concern for high school students accused of misconduct, even while he recalled how difficult it can be for a teacher in such circumstances. He is also easy going and our conversations often drifted pleasantly into news and personal matters.

Nikhyl is keenly interested in clerking. He knows it is a privilege to work under the guidance of a learned judge. He also aspires to be an effective litigator and looks forward to seeing the judicial process from the court's perspective. He values quality research and writing and would like to hone those skills even further.

I am confident that you would be very well served by Nikhyl Sud as your judicial clerk and that you would appreciate knowing him. Please feel free to contact me if you would like to discuss his qualifications further. My mobile number (call/text) is 434-825-1970 and my e-mail address is kfm@law.virginia.edu.

Sincerely,

Kim Forde-Mazrui
Mortimer M. Caplin Professor of Law
Director, Center for the Study of Race and Law
580 Massie Road, Charlottesville, VA 22903-1738
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www.KimForde-Mazrui.com

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to highly recommend Nikhyl Sud for a clerkship in your chambers. I am a Professor of Law at the University of Virginia School of Law. Additionally, I have clerked for the Honorable Dennis Jacobs of the Second Circuit Court of Appeals.

During the 2022 fall semester, Nikhyl enrolled in my seminar, “Race & Criminal Justice.” The upper-level course tackled pressing moral, prudential, and jurisprudential questions (about, for instance, racial disparities in enforcement, prosecution, and punishment). Many students become somewhat paralyzed when presented with tough normative and policy questions for which there are no obvious black-letter doctrinal answers. But Nikhyl engaged ably with the difficult class materials and offered constructive in-class comments and responses to the readings. I was impressed right from the start. He consistently offered insights that moved class discussions in fruitful directions. I found particularly astute his insights about the school-to-prison pipeline—insights informed by his experience as a member of Teach for America.

Nikhyl is exceptionally hard working, diligent, and well prepared. And, most importantly for your purposes, he is a very strong writer. His final seminar paper was one of the best in the class—a thoughtful examination of the harms imposed by even short-term school suspensions. Nikhyl concluded that, in light of these empirically demonstrable harms, students should enjoy greater due process protections against prospective suspensions. The paper was not only substantively strong but also extremely lucid. His prose was powerful and persuasive. Nikhyl has an innate understanding for the proper tone and structure necessary to support and coherently present a set of legal arguments and conclusions—skills that will serve him well as a law clerk. Nikhyl and I have since discussed his plans to expand upon his final project, and I have encouraged him to develop it into a published student Note.

You may notice that Nikhyl received only an A- for my seminar—a stellar grade but one that does not quite reflect the quality of Nikhyl’s phenomenal coursework. Unfortunately, I was hamstrung by a strong class and a strict curve, which left me with the opportunity to award too-few solid A’s¬. If I could have given a couple more solid A’s, one would have gone to Nikhyl. He well deserved the mark. But Nikhyl is more than just an exceptional student and writer. He is admirably active and engaged. He has participated in mock trial since college. He was a finalist in the 2021 UVA Law Trial Advocacy Competition, and he is a current team captain. He is on the managing board of the Virginia Law & Business Review. And he is active in the South Asian Law Student Association.

Finally, I would like to highlight Nikhyl’s experience with Teach for America as a junior high school teacher at an at-risk junior high school in Tulsa, Oklahoma. Like Nikhyl, I was a member of Teach for America after college. (However, unlike Nikhyl, I was too burned out to stay on for a third year, and I never achieved the role of team leader.) The job is, of course, rewarding, but it is also extremely difficult. It takes tremendous dedication, compassion, and organization. It is the kind of experience that takes grit and maturity and builds grit and maturity. And Nikhyl has grit and maturity. He is a gem of a person, and I know that he has what it takes to make a great clerk. He possesses the work ethic and intellect to succeed, and the amiable disposition to make a good addition to any chambers. I hope you will give him that opportunity. If you have any further questions or need additional information, please do not hesitate to contact me.

Thank you,

/s/

Josh Bowers
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University of Virginia School of Law
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United States Department of Justice

United States Attorney
District of New Hampshire

Federal Building *(603) 225-1552*
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301

May 24, 2023

Dear Judge:

I am pleased to recommend Nikhyl Sud for a clerkship in your chambers. Nikhyl spent Summer 2022 as an intern in the United States Attorney's Office for the District of New Hampshire following completion of his 1L year. I have supervised our internship program for a number of years and was able to interact with Nikhyl and the other interns on a daily basis. Based on both my own interactions and those of my colleagues who worked with Nikhyl on numerous assignments, I can confirm he did an excellent job in all respects.

Substantively, Nikhyl was actively engaged in the work of our small but industrious criminal division. He drafted a successful pretrial detention motion in a case where the defendant was charged with illegally possessing machine guns. In another matter he wrote portions of the government's objection to suppress evidence allegedly seized in violation of the Fourth Amendment. He helped prepare another colleague for oral argument on an appeal before the First Circuit. In each of these instances, Nikhyl worked in a self-directed manner to research solutions to real problems and assist our office in its pursuit of justice. Nikhyl's writing was clear and concise. He was curious and would regularly engage me and my colleagues with questions about court proceedings in way that showed he wanted to understand and not just merely observe.

One of the highlights of our summer program is an elaborate mock trial that the interns conduct in one of the federal courtrooms. Nikhyl did an incredible job presenting the government's opening statement and in examining a couple mock witness volunteers from our office. He will certainly make a fine litigator.

Before coming to the United States Attorney's Office, I worked in private practice for a number of years and clerked on the United States District Court for the Eastern District of Pennsylvania for Judge Harvey Bartle III. Based on my experience as a law clerk and my impressions of Nikhyl from last summer, I am confident that he would make a first-rate addition to your chambers. He has outstanding legal acumen, a natural curiosity about the law, and completes assignments efficiently and effectively.

Sincerely,

Charles L. Rombeau
Assistant U.S. Attorney
District of New Hampshire

WRITING SAMPLE

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Enclosed is an excerpt of a note written for Race and Criminal Justice, a class I was enrolled in during the fall of 2022. The note examines due process rights guaranteed to students suspended for short periods. The note was not edited by others.

The excerpt begins by arguing, if a showing of harm were required for extension of due process rights, Supreme Court doctrine supports a finding that short suspensions implicate sufficient harm to compel due process. It then advances that students faced with short suspensions deserve more robust due process than offered in the Supreme Court case, Goss v. Lopez. Section I, referenced in the excerpt, but not included, presented data demonstrating the stream of harm short suspensions potentially initiate, the basis of the reasoning in Sections II and III. The stream begins with a direct negative effect on academic achievement which is correlated with reduced high-school graduation rates. Failure to graduate is linked with an increased chance of future poverty and incarceration. The full excerpt is available upon request.

II. Students Suffer Serious Harm When Suspended for Short Periods

C. Harm from Short Suspensions Should Satisfy any Due Process "Harm Standard"

The majority in Goss v. Lopez refused to require a showing of harm to extend due process guarantees to students suspended for short periods.[1] But in Justice Powell's dissent, he insisted on a "harm standard" for extension of due process, arguing students faced with short suspensions experience injury that "is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule."[2] This section will advance, even if the majority employed Justice Powell's harm requirement for extension of due process, the harsh consequences of short suspensions outlined in Section I would likely have led the Court to require due process regardless.

First, consider the harm short suspensions inflict on educational attainment examined in Section I. Traditionally, the Supreme Court has held a student's ability to achieve an education in high regard. In Brown v. Board of Ed., the Court framed its belief in the "importance of education to our democratic society,"[3] as well as its doubt that "any child may reasonably be expected to succeed in life if [they are] denied the opportunity of an education."[4] The Court additionally acknowledged segregated schools "deprive [black students] of some of the benefits they would receive in a racially integrated school".[5] Ultimately, segregation was unanimously outlawed due to its inherent unequalness.[6]

While not as morally abhorrent as segregation, race pervades suspension data, with Black students experiencing 4 times as many suspensions as their White peers.[7] Moreover, short

[1] See 419 U.S. 565 (1975).
[2] 419 U.S. 565, 586 (Powell, J., dissenting) (1975).
[3] 347 U.S. 483, 493-95 (1954).
[4] Id.
[5] Id.
[6] See id.
[7] See supra notes xx-xx and accompanying text.

suspensions inflict harm on students the Brown Court was intent on preventing. Owing to the fact students are removed from the classroom, short suspensions deny students the opportunity and benefit of an education in the time they serve their suspension. As the data presented in Section I displayed, higher educational attainment demonstrated by unsuspended students reflect this denial of education,[8] pointing to harmful unequalness of outcomes exactly like the Court was attempting to eradicate in segregated schools.[9]

While a uniquely famous opinion, the Court has asserted its support for students throughout history, from holdings providing students with discounted transportation, to opinions recognizing teachers direct a child's ultimate destiny.[10] The veneration the Court shows for education exhibited by its efforts to prevent harm to a student's ability to achieve an education is, on its own, a powerful claim in favor extending due process rights to students suspended for short periods, who demonstrate academic disadvantage compared to their unsuspended peers.[11]

But the harm suffered by students suspended for less than ten days fails to end at a lower rate of scholastic proficiency. The data examined in Section I established that students who struggle academically are more likely to drop out, and individuals who fail to graduate experience a higher likelihood of ending up in poverty.[12] Poverty, admittedly, does not implicate an "interest" outlined in the Due Process Clauses.[13] But, the harm poverty inflicts has moved the

[8] See Lacoe & Steinberg, supra note xx, at 40.
[9] 347 U.S. 483, 493 (1954).
[10] See Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts 207 U.S. 79, 87 (1907) (where the Supreme Court upheld a Massachusetts law requiring pupils be charged a lower price when transported to and from public schools, in part, because education is "recognized… as one of the first objects of public care"); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary 268 U.S. 510 (implying those who educate a child have the ability to "direct [the child's] destiny"). See also, Meyer v. Nebraska 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted"); School Dist. Of Abington tp., Pa. v. Schempp 274 U.S. 203, 230 (Brennan, J., concurring) (1963) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government").
[11] See supra notes xx-xx and accompanying text.
[12] See supra notes xx-xx and accompanying text.
[13] See U.S. Const. amend. XIV, § 1.

Court to provide due process. In Goldberg v. Kelly, the Court was sensitive to the fact those in poverty rely on welfare payments to provide for their families.[14] Considering that reliance, the Court elected to extend robust due process to individuals facing termination of welfare payments.[15] As such, the proposition that harm caused by poverty ought to be weighed in the universe of due process is not novel.

Opponents may argue that a student suspended for a short period is not immediately and certainly subject to a future in poverty. However, neither were the plaintiffs in Goldberg.[16] In Goldberg, the Court was sensitive to the likelihood plaintiffs would experience abject poverty if welfare payments were discontinued, without regard for whether poverty was certain for a particular individual.[17] Bearing in mind that increased likelihood, the Court elected to extend due process.[18] Indeed, losing welfare payments involves a more casual relationship with poverty than low graduation rates linked to short suspensions.[19] But Goldberg stands for the proposition that a higher likelihood of poverty can be perceived as harmful enough to warrant due process rights. Thus, if a showing of harm is required for a guarantee of due process, the increased chance of poverty in the potential downstream consequences of short suspensions carries harm that deserves deliberation in the due process inquiry.

Incarceration, the last ultimate potential consequence of low academic achievement resulting from short suspensions does not implicate a property interest like that of education, but a liberty interest.[20] The rights of criminal defendants facing incarceration are so critical to society that the Constitution outlines them in detail, refusing to leave them up to the interpretation of the

[14] See Goldberg v. Kelly 397 U.S. 254, 258 (1970).
[15] See id.
[16] See id. at 260.
[17] See id. at 265.
[18] See id.
[19] See id.
[20] For a discussion of what constitutes a deprivation of a liberty interest, see 16C C.J.S. Constitutional Law § 1887.

Due Process Clauses.[21] This fact already lends strong support that the existence of incarceration in the downstream consequences of suspensions poses enough potential harm for due process.

Additionally, there exist situations outside of initial trial and incarceration for which the Constitution does not contain explicit procedures where the Court has acknowledged enough harm exists for the Due Process Clauses to trigger. For example, in Morrissey v. Brewer, the Supreme Court held procedural due process demanded hearings before parole could be revoked and an individual placed back in custody.[22] The Court, sensitive to the serious infringement on liberty incarceration entailed, held even a hearing scheduled for a later date after an individual was put back into custody was too late.[23] In line with Supreme Court precedent, S.D. NY cited the fact taking away temporary release programs constituted a "well-recognized" grievous loss of liberty in support of their decision to require due process.[24] Similar to temporary release programs, Wolff v. McDonnel extended due process to prisoners in hearings concerning their accrual of good-time or imposition of solitary confinement.[25]

These cases illustrate when incarceration is implicated in a situation, sufficient harm is often found, demanding due process. Admittedly, similar to the discussion of poverty, short suspensions do not immediately and directly implicate incarceration. But extensive documentation of the school-to-prison pipeline,[26] and the effects of low academic achievement on the likelihood of being incarcerated in the future, at the very least, add support to the

[21] See, e.g., U.S. Const. amend. V; U.S. Const. amend. VI.
[22] Morrissey v. Brewer, 408 U.S. 471, 471 (1972).
[23] Id. at 471-72.
[24] 572 F.2d 393, 398 (2d Cir. 1978).
[25] Wolff v. McDonnell, 418 U.S. 539, 543-44 (1974). Good-time accrual allows prisoners to collect "days" off their sentence for good behavior while incarcerated. See Melisa Pacheco & Christopher Birkbeck, Good Time and Programs for Prisoners 3-18, (Crim. and Juv. Just. Coordinating Council, Working Paper No. 3, 1996), https://nmsc.unm.edu/reports/1996/GoodTimePrograms.pdf.
[26] See Mary Allen Flannery, The School-to-Prison Pipeline: Time to Shut it Down, NAT'L EDUC. ASSOC., Jan. 2015, https://www.nea.org/advocating-for-change/new-from-nea/school-prison-pipeline-time-shut-it-down.

contention that short suspensions cause enough possible harm for due process to apply.[27] But the argument likely need not reach the incarceration stage of negative consequences associated with short suspensions, considering the direct effect short suspensions inflict on a student's ability to achieve an education. This fact alone should reflect sufficient harm necessary to meet a harm standard for due process.

III. The Guarantees of Procedural Due Process Outlined in Goss Do Not Go Far Enough

A. The Magnitude of the Harm Students Face After Short Suspensions Requires More Robust Due Process

Section I and II demonstrated students suffer sufficient harm to require due process guarantees when faced with suspensions under ten days. Whether due process should be extended is, therefore, a foregone conclusion. An equally vital inquiry, however, is the nature of due process extended. In assessing what process to offer students suspended less than ten days, the Goss majority rejected robust due process, offering only a vague guarantee that "students facing suspension… must be given some kind of notice and afforded some kind of hearing."[28] Minimal clarification of those guidelines was advanced a few sentences later, with the Court asserting "oral or written notice of the charges against [students must be provided] and, if [the student] den[ies] them, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story."[29] Instead of elucidating how notice must be delivered, or what information must be contained within, the Court failed to develop any meaningful

[27] See supra notes xx-xx and accompanying text.
[28] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[29] See id.

requirements.[30] Most noticeably absent from the holding were rights regarding parent or guardian involvement in the suspension process.[31]

While the guarantees of due process extended in Goss seem frail, at the time the case was decided, the American judicial system was in the middle of what has been dubbed a "due process revolution," owing to the decade-long effort of the Supreme Court to lay the groundwork for stronger due process rights.[32] Considering the evolved due process standards settled after Goss was handed down,[33] along with the significant harm students face when suspended for even a short time, the guaranteed process to students faced with short suspensions should, at the least, include an adult advocate in a more formal hearing.

The most fundamental landmark case in the evolved due process standards of the 1970s was handed down just a year after Goss was decided. In Mathews v. Eldridge, the Court put an end to the disorder and conclusively described how to determine what process is due to individuals.[34] However, applying the directions the Supreme Court laid out in Mathews for determining procedures due is considered by some to be a "deceptively simple task."[35] The Court dictated multiple factors be "balanced" by courts in resolving what process to extend to parties. The balancing test includes weighing, "the private interest that will be affected by the specific action," the risk of erroneous deprivation and value of additional procedures, and the government's interest in avoiding burdens further process would entail.[36] But the Mathews Court envisioned a more holistic test than just the three factors above, echoing the sentiments of the

[30] See id.
[31] See id.
[32] Jason Parkin, Due Process Disaggregation, 90 NOTRE DAME L. REV. 283, 284 (2014) (noting the Supreme Court set strong due process precedents starting in the 1970s).
[33] Id.
[34] Mathews v. Eldridge, 424 U.S. 319 (1976).
[35] Parkin, supra note 32 at 286.
[36] Mathews v. Eldridge, 424 U.S. 319, 340-48 (1976).

Goldberg Court by holding that "the opportunity to be heard *must* be tailored to the capacities and circumstances of those who are to be heard."[37] In the wake of Mathews, as numerous due process cases wound their way through the circuits, the Supreme Court further encouraged the consideration of "fundamental fairness" in the universe of due process.[38]

In the case of short suspensions, the most impactful consideration in the due process framework is likely the capacities and circumstances of students faced with suspensions, which additionally implicates fundamental fairness. Suspensions are, admittedly, more common in secondary schools, but primary school suspensions are still a common practice.[39] Primary and secondary schools serve students aged six through eighteen. The legal age of majority in almost all states is eighteen, meaning, in most states, in the eyes of the law, only children are faced with suspensions.[40] Children, unquestionably, have a lack of capacity to advocate for themselves compared to adults.

A child's lack of capacity to act as an advocate for themselves has historically motivated lawmakers to weigh the fairness of laws as they relate to them. For example, 170 years ago the Supreme Court of Ohio held a marriage void because one of the parties was only sixteen.[41] In a similar vein, many states have increased their age of consent to eighteen.[42] In the context of legal procedure, most states refuse to require minors to be heard in "adult" court when accused of a

[37] Id; see Goldberg v. Kelly, 397 U.S. 254, 268 (1970).
[38] See, e.g., Santosky v. Kramer, 455 U.S. 745, 751 (1982) (acknowledging the Court *must* extend fundamentally fair procedures to parents faced with losing their children).
[39] See Daniel J. Losen & Paul Martinez, Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn 21-23, UCLA CR. PROJ. (2020) (highlighting the fact that suspensions occur in both primary and secondary schools, but are more common in secondary schools) https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn.
[40] Age of Majority, CORNELL L. SCH. L. INFO. INST., last visited Nov. 7 , 2022, https://www.law.cornell.edu/wex/age_of_majority.
[41] See Shafher v. State, 1851 WL 1 (Ohio Dec. 1, 1851).
[42] WHAT IS THE LEGAL AGE OF CONSENT?, AGE OF CONSENT & SEXUAL ABUSE LAWS AROUND THE WORLD (last visited Nov. 4, 2022), https://www.ageofconsent.net/states.

crime until the age of eighteen.[43] Many states, like California, do not easily permit minors to enter contracts and allow them to disaffirm contracts before they reach the age of majority.[44] While a child's lack of capacity and vulnerability may seem like common sense as both contemporary and age-old laws demonstrate, modern research into a child's psychology further supports the fact that children do not possess the same capacity to represent themselves as adults. According to the psychologist Jean Piaget, children only begin to develop the skills to reason on concrete evidence between the ages of seven and eleven.[45]

This lack of capacity to reason and advocate must be considered when contemplating what process to extend to children.[46] Quite obviously, those with less capacity require more robust procedural due process rights to counteract that lack of capacity and produce fundamentally "fair" procedures.[47] The Goss majority claims students should be given only an "informal hearing" to present their side of the story when faced with short suspensions.[48] Not only does the psychology of a child call into question the efficacy and fairness of them advocating for themselves in a suspension hearing, but the law has historically recognized exceptions to protect a child from their own vulnerabilities. Accordingly, having an adult advocate represent a student during a suspension hearing, on the one hand, promotes a more fundamentally fair process for students by allowing them an advocate with an increased capacity

[43] Age Axis, INTERSTATE COMMISSION FOR JUVENILES (last visited Nov. 4, 2022), https://www.juvenilecompact.org/age-matrix.
[44] See Cal. Fam. Code § 6700, 6701, 6710.
[45] See JEAN PIAGET, THE CHILD'S CONCEPTION OF THE WORLD 171-94 (Routledge & K. Paul ed., 1929); see also, O'rinova F. O'ljayevna, The Development of Logical Thinking of Primary School Students in Mathematics, 8 EUROPEAN J. OF RES. & REFLECTION IN EDUC. SCIENCES, 235, 236-38 (2020) (noting logical thinking involved in math is not developed in primary school children and must be actively developed).
[46] 424 U.S. 319, 349 (1976).
[47] See id.
[48] Goss v. Lopez, 419 U.S. 565, 579 (1975).

to reason, and, on the other hand, aligns with the historical treatment of children by the law due to their lack of capacity.

An equally important piece of the Mathews balancing test in this context is the "private interest that will be affected by the specific action".[49] As discussed in Section I, the potential private interests implicated when short suspensions are levied against students are vast and complex, including an increased chance of low academic achievement,[50] dropping out,[51] poverty, and incarceration.[52] These considerations similarly support the presence of an adult advocate in short term suspension hearings.

Additionally, the private interest of education cannot easily be reapplied to a student after a suspension. In Mathews, the Court was less inclined to extend robust due process like a pre-loss hearing to an individual facing the loss of disability payments due to the fact payments could both easily be resumed and include "retroactive" payments if the court deemed the deprivation erroneous.[53] In the context of suspensions, students can easily "resume" their presence in the classroom when the suspension is over, but adequately resuming a student's education does not equate to restarting cash payments and distributing those withheld.[54] As discussed in Section I, when suspended for even short periods, students forfeit the opportunity to build foundational knowledge to complete later lessons. In underfunded schools especially, students are often unable to receive any form of remedial instruction, regularly commencing an academic downward spiral.[55] While students may "return" to the classroom, the negative effects of short

[49] 424 U.S. 319, 321 (1976).
[50] See supra notes xx-xx and accompanying text.
[51] See supra notes xx-xx and accompanying text.
[52] See supra notes xx-xx and accompanying text.
[53] See Mathews v. Eldridge, 424 U.S. 319, 321 (1976). The Court contrasted this with the litigant in Goldberg, who had a "brutal need" for welfare payments. Id. The Goldberg Court considered this an important factor in calculating due process. See 397 U.S. 254, 258 (1970).
[54] See supra notes xx-xx and accompanying text.
[55] Id.

suspensions nevertheless persist. Therefore, short suspensions point to an especially necessary and difficult to replace private interest in education, unlike the temporary loss of disability payments in Mathews. This points to the necessity of an adult advocate in more formal short suspension proceedings to ensure fundamental fairness.

Lastly, the Court requires consideration of the risk of erroneous deprivation and the probable value of additional procedures.[56] Through a subjective moral lens, it can be argued that suspensions result in erroneous deprivation given students fail to deserve removal for the simple act of "disruption", behavior that regularly triggers short suspensions. But opinions regarding what punishment is "deserved" certainly vary among educators.

Erroneous deprivation might objectively occur when students are suspended over false or misleading reports. A formal hearing with an adult representative can help encourage administrators to straighten out facts, preventing erroneous suspensions. In this sense, an adult advocate can be analogized to the essential process of police applying for search warrants. In his innovative article, Professor Stuntz argues search warrants serve an important protective function due to the fact they require a "police officer's account of facts to be given", positing that warrants requiring police to support a potential search with articulable and established fact reduce the chance of unjustified searches.[57] Similarly, requiring a hearing with an adult advocate obliges school administrators to produce authentic facts that support the proposed suspension, encouraging a substantial basis for the suspension in the first place, thus reducing the chance of erroneous suspensions.

[56] See 424 U.S. 319, 321 (1976).
[57] William J. Stuntz, Warrants and Fourth Amendment Remedies, 55 VA. L. REV. 881, 884 (1999).

Applicant Details

First Name	**Jacob**
Middle Initial	**H.**
Last Name	**Sugarman**
Citizenship Status	**U. S. Citizen**
Email Address	**jacob.sugarman@duke.edu**
Address	**Address** Street **27 Saturn Ct** City **Syosset** State/Territory **New York** Zip **11791** Country **United States**
Contact Phone Number	**5164580223**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2020**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Duke Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garrett, Brandon
bgarrett@law.duke.edu
919-613-7090
Root Martinez, Veronica
martinez@law.duke.edu
919-613-8540
Brod, Nick
nicholas.brod@duke.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1420 Broad St
Durham, NC 27705

June 10, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in clerking for you during the 2024-25 term. I am a third year law student at Duke Law School and expect to receive my J.D. in May of 2024. I will be available to clerk any time after graduation.

I have the research, editing, and writing skills to excel as your clerk. As a member of the Duke Law Journal, I have enjoyed the opportunity to focus my editing skills while broadening my knowledge of substantive law. Furthermore, my experiences with Duke's Appellate Practice course and Moot Court Board have sharpened my analytical skills and developed my ability to piece together complex bodies of law. I was particularly proud to have received a 4.0 in Appellate Practice, where I used my skills to write an appellate brief and conduct oral argument in front of a federal judge.

Enclosed are copies of my resume, Duke Law and undergraduate transcripts, and the brief I wrote for Appellate Practice. Also enclosed are letters of recommendation from North Carolina Assistant Solicitor General Nick Brod, who co-taught the Appellate Practice course, Professor Brandon L. Garrett, and Professor Veronica Root Martinez. Please let me know if you need any additional information. Thank you for your consideration.

Sincerely,

Jacob Sugarman

JACOB SUGARMAN
1420 Broad St, Durham, NC 27705 | jacob.sugarman@duke.edu | (516) 458-0223

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: 3.81
Honors: Recognized as within the top 5% of the Class of 2024
Steven R. Shoemate Scholarship
Alexandra D. Korry L'86 Civil Rights Fellowship (Spring 2022)
Dean's Award for Ethics & Professional Responsibility (Fall 2022)
Activities: Duke Law Journal
Moot Court Board — Quarterfinalist in the Hardt Cup Tournament (2022)
Innocence Project
Fair Chance Project

The University of Michigan, Ann Arbor, MI
Bachelor of Arts in Philosophy, Politics, and Economics, April 2020
Bachelor of Music in Bassoon Performance, *with honors*, April 2020
GPA: 3.7
Activities: Turn Up Turn Out
Campus Election Engagement Project

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP
Summer Associate, May – August 2023

Michigan State Appellate Defenders Office, Detroit, MI
Legal Intern, June – August 2022
- Researched appellate issues and developed legal theories for ongoing criminal appeals.
- Drafted memos summarizing procedural and substantive law for the Direct Appeals Unit.
- Worked with the Juvenile Lifer Unit to prepare for resentencing hearings.

Hudson PC, Ann Arbor, MI
Legal Evidence Specialist, August 2020 – March 2021
- Drafted and edited immigration petitions for researchers, professors, and business leaders.
- Reviewed legal documentation and communicated with clients to obtain evidence.

University Musical Society, Ann Arbor, MI
Patron Services Representative, November 2016 – April 2020
- Sold subscriptions, group sales, and individual tickets and managed operational data.
- Acted as the public face of UMS by resolving patron requests and accessibility issues.

DNC Organizing Corps 2020, Oakland County, MI
Field Organizer, June – August 2019
- Acted as head of volunteer outreach and training for State House Districts 43 and 44.
- Organized canvass launches, phone banks, and volunteer training events.

Campus Election Engagement Project, Ann Arbor, MI
Fellow, April – November 2018
- Created and implemented an action plan to increase student voter turnout.
- Organized voter registration and information events with regional leaders.

ADDITIONAL INFORMATION

- Completed a thesis project on interdisciplinary performance for my B.M. degree (2020).

DUKE UNIVERSITY - Unofficial Transcript

Name: **Jacob Herbert Sugarman** **6/10/2023**
Student ID: **2319667**

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	3.8	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	3.9	GRD

Term GPA: 3.666 Term Earned: 13.500

Cum GPA: 3.666 Cum Earned: 13.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.9	GRD
LAW	130	CONTRACTS	4.500	3.6	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.8	GRD
LAW	170	PROPERTY	4.000	3.9	GRD

Term GPA: 3.797 Term Earned: 17.000

Cum GPA: 3.739 Cum Earned: 30.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.739 Cum Earned: 30.500

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	240	ETHICS PROF RESPONSIBILITY	3.000	4.2	GRD
LAW	242	SOCIAL JUSTICE LAWYERING	2.000	4.0	GRD
LAW	245	EVIDENCE	4.000	4.0	GRD
LAW	285	LABOR RELATIONS LAW	3.000	3.8	GRD
LAW	405	APPELLATE PRACTICE	3.000	4.0	GRD

Term GPA: 4.000 Term Earned: 15.000

Cum GPA: 3.825 Cum Earned: 45.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Jacob Herbert Sugarman** **6/10/2023**
Student ID: **2319667**

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	342	FEDERAL COURTS	5.000	3.8	GRD
LAW	420	TRIAL PRACT	3.000	3.9	GRD
LAW	429	CIVIL JUSTICE CLINIC	4.000	3.8	GRD
LAW	555	LAW AND FINANCIAL ANXIETY	2.000	3.4	GRD

Term GPA: 3.764 Term Earned: 14.000

Cum GPA: 3.810 Cum Earned: 59.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.810 Cum Earned: 59.500

Law School Career Earned

Cum GPA: 3.810 Cum Earned: 59.500

THE UNIVERSITY OF MICHIGAN - ANN ARBOR

Unofficial Transcript - Not an Official Transcript

Sugarman,Jacob Herbert
UM ID: 09928960 UIC: 8217822794
Uniqname: JSUGARMA

Citizen: U.S. Citizen

Sugarman,Jacob Herbert (516) 458-0223
801 S 1ST St
Ann Arbor, MI 48103
United States

Previous Names:
Sugarman,Jacob
Sugarman,Jacob H

University of Michigan Degrees Awarded

School/College: Literature, Sci, and the Arts
Major: Philosophy, Politics and Economics
Degree: Bachelor of Arts
Awarded: 30-Apr-2020

School/College: Music, Theatre & Dance
Major: Performance
Degree: Bachelor of Music, With Honors
Awarded: 30-Apr-2020

Fall 2016		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
Transfer Test Credit							
Advanced Placement							
BIOLOGY	195	Introductory Biology	T	0.00	0.00	5.00	0.00
ENGCMPTC	101X	Departmental	T	0.00	0.00	3.00	0.00
ENGLISH	101X	Departmental	T	0.00	0.00	3.00	0.00
HISTORY	101X	Departmental	T	0.00	0.00	4.00	0.00
HISTORY	102X	Departmental	T	0.00	0.00	4.00	0.00
HISTORY	103X	Departmental	T	0.00	0.00	4.00	0.00
POLSCI	111	Intro Amer Pol	T	0.00	0.00	4.00	0.00
POLSCI	140	Int Compar Pol	T	0.00	0.00	4.00	0.00
Undergrad Music, Thtre & Dance							
Transfer Credit Accepted:					**0.00**	**31.00**	**0.00**

Fall 2016		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	139	Performance	A	4.00	4.00	4.00	16.00
ECON	102	Principle Econ II	B	4.00	4.00	4.00	12.00
ENS	347	Univ Band Concert Band	A	2.00	2.00	2.00	8.00
MUSICOL	139	Introduction	A-	2.00	2.00	2.00	7.40
PHIL	153	Philos&the Arts	B+	3.00	3.00	3.00	9.90
THEORY	139	Bmus Aural Sk I	B	1.00	1.00	1.00	3.00
THEORY	149	Bmus Wrtg Sk I	A-	2.00	2.00	2.00	7.40
Term Total		**GPA: 3.538**		**18.00**	**18.00**	**18.00**	**63.70**
Cumulative Total		**GPA: 3.538**			**18.00**	**49.00**	**63.70**

Winter 2017		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	140	Performance	A	4.00	4.00	4.00	16.00
ENGLISH	125	Writing&Academic Inq	A	4.00	4.00	4.00	16.00
ENS	345	Univ Orchestras University Philharmonia Orch	A	1.00	1.00	1.00	4.00
MUSICOL	140	Hist of Mus	A	2.00	2.00	2.00	8.00
POLSCI	101	Intro Pol Thry	A-	4.00	4.00	4.00	14.80
THEORY	140	Bmus Aurl Sk II	A-	1.00	1.00	1.00	3.70
THEORY	150	Bmus Wrtg Sk II	B+	2.00	2.00	2.00	6.60
Term Total		**GPA: 3.838**		**18.00**	**18.00**	**18.00**	**69.10**
Cumulative Total		**GPA: 3.688**			**36.00**	**67.00**	**132.80**

Fall 2017		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	239	Performance	A	2.00	2.00	2.00	8.00
ECON	101	Principle Econ I	A	4.00	4.00	4.00	16.00
ENS	347	Univ Band Concert Band	A	2.00	2.00	2.00	8.00
ENS	461	Small Woodwind Ens Woodwind Quintets	A	1.00	1.00	1.00	4.00
JAZZ	220	Basic Musicianship I	B+	3.00	3.00	3.00	9.90
MUSICOL	239	Hist of Mus	B+	2.00	2.00	2.00	6.60
PPE	300	Intro Poli Econ	A-	4.00	4.00	4.00	14.80
Term Total		**GPA: 3.738**		**18.00**	**18.00**	**18.00**	**67.30**
Cumulative Total		**GPA: 3.705**			**54.00**	**85.00**	**200.10**

THE UNIVERSITY OF MICHIGAN - ANN ARBOR

Unofficial Transcript - Not an Official Transcript

Sugarman,Jacob Herbert
UM ID: 09928960 UIC: 8217822794
Uniqname: JSUGARMA

Winter 2018		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	240	Performance	A-	4.00	4.00	4.00	14.80
ENGLISH	225	Acad Argumentation	B+	4.00	4.00	4.00	13.20
		Critical Thinking and Ethical Arguments					
ENS	345	Univ Orchestras	A	1.00	1.00	1.00	4.00
		University Symphony Orchestra					
JAZZ	221	Basic Musicianshp II	B+	3.00	3.00	3.00	9.90
MUSICOL	240	Hist of Mus	B+	2.00	2.00	2.00	6.60
PHIL	444	Groups & Choices	A-	4.00	4.00	4.00	14.80
Term Total		**GPA: 3.516**		**18.00**	**18.00**	**18.00**	**63.30**
Cumulative Total		**GPA: 3.658**			**72.00**	**103.00**	**263.40**

Fall 2018		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
ASTRO	115	Intro Astrobiology	B+	3.00	3.00	3.00	9.90
BASSOON	339	Performance	A	2.00	2.00	2.00	8.00
ENS	347	Univ Band	A	1.00	1.00	1.00	4.00
		Symphony Band					
MATH	115	Calculus I	B-	4.00	4.00	4.00	10.80
PHIL	359	Law&Phil	A	4.00	4.00	4.00	16.00
SPANISH	231	Second Year Span	B	4.00	4.00	4.00	12.00
Term Total		**GPA: 3.372**		**18.00**	**18.00**	**18.00**	**60.70**
Cumulative Total		**GPA: 3.601**			**90.00**	**121.00**	**324.10**

Winter 2019		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	340	Performance	A	4.00	4.00	4.00	16.00
ECON	401	Interm Micro Thry	B+	4.00	4.00	4.00	13.20
ENS	347	Univ Band	A	2.00	2.00	2.00	8.00
		Symphony Band					
ENS	461	Small Woodwind Ens	A	1.00	1.00	1.00	4.00
PHIL	442	Topics-Political	A-	3.00	3.00	3.00	11.10
		Discipline & Punishment					
		Upper Level Writing					
		Requirement Satisfied					
SPANISH	232	Second Year Span	B-	4.00	4.00	4.00	10.80
Term Total		**GPA: 3.505**		**18.00**	**18.00**	**18.00**	**63.10**
Cumulative Total		**GPA: 3.585**			**108.00**	**139.00**	**387.20**

Spring 2019		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
ENGLISH	317	Literature&Cult	A	3.00	3.00	3.00	12.00
		NELP					
ENGLISH	328	Writing&Environment	A	3.00	3.00	3.00	12.00
		NELP					
ENGLISH	473	Topics Amer Lit	A	3.00	3.00	3.00	12.00
		NELP					
		Upper Level Writing					
		Requirement Satisfied					
Term Total		**GPA: 4.000**		**9.00**	**9.00**	**9.00**	**36.00**
Cumulative Total		**GPA: 3.617**			**117.00**	**148.00**	**423.20**

Fall 2019		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
ANTHRBIO	167	Evol Envir GlobHeath	A-	4.00	4.00	4.00	14.80
BASSOON	439	Performance	A	2.00	2.00	2.00	8.00
ENS	345	Univ Orchestras	A	1.00	1.00	1.00	4.00
		University Philharmonia Orch.					
ENS	466	Piano Chamber Mus	A	1.00	1.00	1.00	4.00
ORGSTUDY	495	Special Topics	A	3.00	3.00	3.00	12.00
		Economy and Society					
POLSCI	300	Quant Emp Mthd PolSc	A	4.00	4.00	4.00	16.00
POLSCI	495	Sem Pol Theory	A	3.00	3.00	3.00	12.00
		Work, Virtue, Citizenship					
Term Total		**GPA: 3.933**		**18.00**	**18.00**	**18.00**	**70.80**
Cumulative Total		**GPA: 3.659**			**135.00**	**166.00**	**494.00**

Winter 2020		Undergrad Music, Thtre & Dance	Grade	Hours	MSH	CTP	MHP
BASSOON	440	Performance	A+	4.00	4.00	4.00	16.00
ENS	347	Univ Band	A	1.00	1.00	1.00	4.00
		Concert Band					
ENS	466	Piano Chamber Mus	A	1.00	1.00	1.00	4.00
JAZZ	470	Improv Forms	A	1.00	1.00	1.00	4.00
MUSPERF	440	Senior Recital	P	0.00	0.00	0.00	0.00
PIANO	112	Performance	A	2.00	2.00	2.00	8.00
POLSCI	348	Pol Econ Developmt	A	3.00	3.00	3.00	12.00
PPE	400	Political Economy	A	3.00	3.00	3.00	12.00
		Upper Level Writing					
		Requirement Satisfied					
THEORY	460	Special Courses	A	3.00	3.00	3.00	12.00
		Post-Modernist Analysis: Four Crazies					
Term Total		**GPA: 4.000**		**18.00**	**18.00**	**18.00**	**72.00**
Cumulative Total		**GPA: 3.699**			**153.00**	**184.00**	**566.00**

THE UNIVERSITY OF MICHIGAN - ANN ARBOR
Unofficial Transcript - Not an Official Transcript

Sugarman,Jacob Herbert
UM ID: 09928960 UIC: 8217822794
Uniqname: JSUGARMA

Academic Statistics for Undergrad Music, Thtre & Dance		**MSH**	**CTP**	**MHP**
Total to Date	**GPA: 3.699**	153.00	184.00	566.00

Program Action History: MDDP Music & LSA UG Deg
06/03/2020 Completion of Program
Performance BMus
09/02/2018 Activate
Performance BMus

Program Action History: Performance:Bassoon BMus
09/01/2018 Discontinuation
Performance BMus / Bassoon
04/27/2016 Matriculation
Performance BMus / Bassoon

Program Action History: MDDP LSA & Music UG Deg
06/03/2020 Completion of Program
Philosophy, Politics & Econ BA
09/02/2018 Plan Change
Philosophy, Politics & Econ BA
09/02/2018 Activate
LSA Undeclared

Honors, Non-Degree
12/22/2016 University Honors
04/27/2017 University Honors
12/21/2017 University Honors
04/26/2018 University Honors
05/01/2019 University Honors
12/20/2019 University Honors
04/30/2020 University Honors
03/31/2021 James B. Angell Scholar

Academic Previous Experience

Boston University	MA, United States
Syosset High School	NY, United States
High School Diploma	06/22/2016

End of Unofficial Transcript

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Sugarman

Dear Judge Walker:

I write to recommend Jacob Sugarman for a judicial clerkship in your chambers. He has an extremely strong record at Duke Law, which has continued to grow stronger in each semester. The curve at Duke Law is extremely demanding, and the grading more fine-grained than at other top law schools. Jacob is collegial, creative, a beautiful writer, and has a deep commitment to public interest work, having taken on challenges in a number of different areas, from complex appellate work, to immigration work, to post-conviction work on innocence-related claims. He would be such a delight in chambers and I recommend Jacob in the strongest possible terms.

I first came to know Jacob in my evidence course in fall 2022. Jacob wrote one of the best exams in the course and received a perfect 4.0 grade in a very large and competitive class. I was not surprised at this performance. Jacob asked excellent questions throughout the course and was easily one of the most engaged students. I deeply enjoyed my conversations about the material with Jacob; these were a highlight of the fall course. Jacob loves thinking carefully about litigation, evidence rules, and what policy choices and theories structure those rules. Jacob is an excellent speaker and oral advocate and was a quarterfinalist in the Hardt Cup Tournament during his first year.

Jacob has done a range of other impressive research and public interest work at Duke Law and has received a number of awards and honors during his time here. Jacob received a civil rights fellowship last spring, and this past fall received the Dean's Award for Ethics and Professional Responsibility. Jacob's involvement in law school activities have ranged from casework with the student Innocence Project, pro bono record expunction work, to participating in the moot court board and the Duke Law Journal. Jacob has wide ranging experience before law school, majoring in both Philosophy and Bassoon, working for the Universal Music Society at the University of Michigan during college, paralegal work, and current work in the Civil Justice Clinic at Duke Law. This experience has added a level of maturity to Jacob's work.

In short, Jacob is an academically gifted student, a diligent worker, a strong writer, and a very gifted and personable communicator. Jacob is committed to litigation and public sector work and has taken on a variety of perspectives and experiences, working as a paralegal, in a state appellate defender's office, and at a large firm. Jacob is balanced, collegial, hardworking, and would be a great asset in Chambers. Please feel free to contact me at (919) 613-7090 if you would like to discuss his application, and I thank you for considering it.

Very truly yours,

Brandon L. Garrett
L. Neil Williams, Jr. Professor of Law and
Director, Wilson Center for Science and Justice

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Sugarman

Dear Judge Walker:

I write to recommend Jacob Sugarman to serve as a law clerk in your chambers. I am confident that his experiences in law school have prepared him to perform the research, writing, and other duties necessary to be a successful law clerk. Additionally, his easy-going personality paired with an extraordinary work ethic will make him a valuable addition to your chambers.

Jacob was a student in my Fall 2022 Ethics and Professional Responsibility course. This is a large lecture course, but Jacob stood out from the very beginning. He was focused, asked excellent questions, understood the concepts and their nuance, and was a valuable member of the class community. Jacob received the highest grade in the class, and I was impressed with his ability to analyze the issues presented on the exam. Importantly, my exam is performed under time pressure and has word count limitations. Jacob masterfully identified the most relevant arguments to make for each issue presented and went on to write cogent and persuasive responses. In my over a decade of law teaching, his is one of the very best examinations I have had the pleasure to read.

On a more personal note, I have had the opportunity to interact with Jacob more informally outside of the classroom. He easily interacts with his classmates, and he happily participates in conversations across a wide range of topics. We spoke of his genuine interest in clerking as well as his long-term career goals. Jacob understands that a clerkship will provide him with an invaluable learning opportunity that will assist him in his future efforts within the legal profession. Specifically, Jacob hopes to pursue a litigation-focused practice, and he believes clerking will provide him with experiences, information, and skills that will assist him over the course of his career. My strong sense is that he will eventually end up in the government or non-profit sector.

Based on my interactions with Jacob inside and outside of the classroom, I have concluded that he is a hard-working, intellectually curious, and driven student. Jacob will complete assignments with a positive, unpretentious attitude. He is smart enough to know when he should ask more questions and driven enough to work hard to find the right answers. In short, Jacob will be an asset to those who work with him.

If you have any further questions regarding Jacob, please do not hesitate to contact me.

Sincerely yours,

Veronica Root Martinez
Professor of Law

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NICHOLAS S. BROD
DEPUTY SOLICITOR GENERAL

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February 13, 2023

Re: Jacob Sugarman
Clerkship recommendation

Dear Judge:

I write in support of Jacob Sugarman's application for a clerkship in your chambers.

I am a Deputy Solicitor General in the North Carolina Department of Justice and a Lecturing Fellow at Duke Law School. Jacob was a 2L student in my Fall 2022 Appellate Practice class, which I co-taught with two other colleagues in our state SG's office. I clerked for a federal appellate judge and a federal district judge after law school, so Jacob has asked me to comment on his performance in light of my experiences as a judicial clerk. I can also comment on Jacob's performance relative to that of other law students.

Jacob was a standout student in our Appellate Practice course. The class is an upper-level seminar that introduces students to appellate advocacy and the appellate process. The central project entails each student briefing one side of a case and presenting oral argument for that side before a federal court of appeals judge. We based the case on a recent en banc decision from a circuit court that raised complex, novel issues of constitutional and statutory law.

Jacob received the second-highest grade in the class. That accomplishment is particularly impressive given that more than half of the students in the class were on law review, with many going on to clerk for federal judges after graduation.

Jacob excelled on both his brief and his oral argument. As for the brief, the court of appeals judge who evaluated Jacob's work called it a "great brief" that was "very well argued." We shared that view. First, the brief took complex areas of law and made them simple, explaining difficult legal doctrines in a clear, logical, and organized fashion. But Jacob went beyond merely describing the law. His brief also explained the underlying reasons for seeing the doctrine his way, rather than merely asserting that cases stood for a particular rule. The result was an unusually sophisticated argument focused on both precedent and first principles. That ability to analyze case law without losing sight of the bigger picture would make him a reliable collaborator on challenging cases.

Second, the brief also reflected thorough legal research. The brief was an open-universe assignment, and we imposed no limits on the scope of students' research. Jacob marshalled an impressive set of cases, statutes, agency regulations, and even historical materials to support his arguments. His review of the factual record was similarly exhaustive. We gave students access to the case's nearly 3,000-page joint appendix. Throughout his brief, Jacob routinely incorporated various facts from across the appendix to make creative arguments that few others saw. The kind of comprehensive research that Jacob demonstrated in his brief is what I strived for when I was a clerk working on bench memos or draft opinions with my judges.

Third, Jacob's sentence-level writing was consistently first-rate. He used short, clear topic sentences to great effect. He incorporated transitions of logic both between and within individual paragraphs. And his word choices were appropriate and professional: the brief made a persuasive argument without being unnecessarily argumentative.

Jacob's oral argument was just as successful. Like his written work product, Jacob's oral communication was unusually clear and well-organized, even under tough questioning from a sitting federal appellate judge, who later praised Jacob's performance. I am confident that Jacob would be able to have constructive conversations about cases as a law clerk.

In addition to Jacob's substantive performance during the class, Jacob was also just great to work with. I interacted with Jacob regularly over the course of the semester as he drafted his brief and prepared for oral argument. Jacob is mature and professional but still has a warm demeanor. And I was particularly impressed by how Jacob sought out constructive criticism from me on his brief and oral argument, even though he received such a high grade in the class. Jacob's openness to feedback and drive to improve will make him an effective team player in chambers.

Jacob has all the qualities of an excellent law clerk. He has my enthusiastic support, and I recommend him to you without reservation. If I can provide any further information, please feel free to contact me.

Sincerely,

/s/ Nicholas S. Brod

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Writing Sample

This is an appellate brief written for my Appellate Practice course in Fall 2022. The problem was based on *Charter Day School v. Peltier* and I was assigned to write the Petitioner's Brief. I've lightly edited the brief for clarity and space.

No. 22-000

In the Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL.,
Petitioners,
v.

BONNIE PELTIER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Charter Day School is a non-profit corporation that was granted a charter by North Carolina to operate a public school. Although the school is open to all public school students and receives state funding, no student must attend Charter Day. Further, North Carolina allows the school to implement novel educational methods and student policies with minimal state oversight. Did the school act under color of state law by implementing a gender-specific dress code policy?

Additionally, Charter Day receives federal funds and is governed by Title IX. However, Title IX does not explicitly mention gender-specific dress codes, and the Department of Education has stated that such codes are for local determination. Does interpreting Title IX to prohibit gender-specific dress codes violate the Spending Clause?

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INTRODUCTION

By adopting the Charter School Act, North Carolina empowered charter schools to innovate around the many problems plaguing traditional public schools. One such school, Charter Day, quickly succeeded where many traditional public schools had failed. Since the school was largely independent from state control, Charter Day could freely experiment with novel solutions to the educational crisis. For example, Charter Day centered traditional western values to discourage violence and bullying. And, central here, Charter Day implemented a dress code policy to keep order and instill respect. As a result, Charter Day's students have thrived. But today, the Court will decide whether Charter Day's successful experiment will be burdened by federal intervention and litigation costs.

And the consequences will extend far beyond Charter Day alone. Public charter schools succeed because they innovate freely, without the heavy hand of the state getting in the way. But calling public charter schools state actors would rip away that independence. Across the country, public charter schools would be forced to homogenize. Innovative methods would be axed in favor of standardized approaches proven immune from § 1983 litigation. And without the ability to choose truly independent public schools, students and families will suffer most.

As if that wasn't enough, the Court will also decide whether public charter schools will be accountable for unforeseeable expansions of Title IX. Depending on

the outcome, public charter schools may be forced to forego crucial federal funds altogether. After all, no authority — not the Department of Education, Congress, or this Court — suggests that Title IX covers gender-specific dress codes. Nevertheless, the Court is asked to impose this surprise condition on all public charter schools. Moving forward, schools like Charter Day would be forced to think twice before accepting crucial federal funds. What other surprise conditions might the federal government spontaneously impose? Are federal funds worth the risk?

Few things are more important to the future of our country than education. North Carolina chose to encourage innovative schools like Charter Day, to the benefit of families across the state. The Court should not get in the way.

As such, we respectfully ask that the judgement of the court of appeals be reversed.

STATEMENT OF THE CASE

A. North Carolina encourages the creation of charter schools to address gaps in the state's traditional public school system.

In 1996, North Carolina passed the Charter School Act to "provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools." N.C. Gen. Stat. § 115C-218. The legislature sought to empower charter schools to "improve student learning" and implement "different and innovative teaching methods" not available in traditional public schools. *See Id.* § 115C-218(a)(1), (3) (outlining the legislature's goals). Today, by all accounts, the legislature has achieved this goal — North Carolina boasts hundreds of charter schools, each providing unique educational opportunities to their students. Pet. App. 85.

But charter schools have not supplanted the traditional public school system entirely. As such, students eligible to attend public school in North Carolina are never required to attend a charter school. N.C. Gen. Stat. § 115C-218.45(a)–(b). Instead, parents and students are free to decide whether the unique opportunities provided by charter schools are the best fit for their individual needs. *See Id.* (allowing but not requiring charter school attendance).

Indeed, recognizing the significant differences between charter schools and traditional public schools, the legislature decided to adopt distinct administrative procedures and regulatory

frameworks for the two. Thus, despite being labeled 'public' schools under state law, charter schools are operated by private, nonprofit corporations rather than local public school boards. *Id.* § 115C-218.15(a)–(b). In fact, unlike traditional public schools, local school boards have no influence over the operation of charter schools. *See Id.* § 115C-218.15(d) (empowering private boards of directors). Instead, the legislature empowered each charter school's board of directors to independently determine each school's budget, curriculum, and operating procedures. *Id.*

And unlike traditional public schools, which are regulated by statutes applicable to local boards of education, charter schools are governed by their charter with the state. *Id.* §§ 115C-218.10, 115C-218.15(c). Under this framework, charter schools have considerable freedom from state oversight and can experiment and break new pedagogical ground. Indeed, through this arrangement, the legislature gave charter schools extensive authority to implement their own pedagogical methods and policies on student conduct and discipline. *See Id.* §§ 115C-218.60, 115C-390.2(a) (requiring, but not supervising, student discipline policies); *See also Id.* § 115C-218.10 (exempting charter schools from school board rules). The state does not supervise the content of these methods or polices. *Id.* And the state has explicitly disclaimed liability "for any acts or omissions of [a] charter school," further highlighting their hands-off approach. *Id.* § 115C-218.20(b).

That said, charter schools remain accountable to the people of North Carolina through their charter

agreements with the state. For example, a charter school's agreement may incorporate federal and state constitutional provisions, applicable civil rights statutes, and health and safety regulations. *See* J.A. 225 (Charter Day's agreement). And North Carolina may revoke a charter agreement if a charter school violates the agreement or otherwise underperforms. N.C. Gen. Stat. § 115C-218.95. So, charter schools have good reason to comply with the terms of their charter agreements. After all, charter schools lose access to considerable public funding when their charter is revoked, among other penalties. *See Id.* §§ 115C-218.105(a)–(c), 115C-218.95 (tying state funding to valid charter agreements).

B. Charter Day School obtains a charter from North Carolina and successfully provides innovative educational programming for decades.

In 1999, Charter Day School was incorporated as a nonprofit corporation. Pet. App. 111. The school sought to provide a "disciplined, caring classroom environment that emphasizes traditional values and direct instructional methods" to the rural community of Brunswick County, North Carolina. J.A. 108. And the school hoped to ameliorate the significant school overcrowding problems facing the area at the time. J.A. 111, 209–10. So, one year later, the school applied for a charter pursuant to the Charter School Act and was approved. Pet. App. 8. Since then, North Carolina has repeatedly renewed the school's charter. J.A. 2716.

From the start, the school offered innovative educational methods not otherwise available in Brunswick County. *See* J.A. 111 (outlining Charter Day's educational philosophy and goals). For example, the school employs a unique "direct instruction" pedagogy which has been shown to "dramatically improve learning over other teaching methodologies." J.A. 114; *See generally* J.A. 191–93 (summarizing the method). And the school has adopted a uniform approach to curriculum design, teaching a "classical curriculum" that highlights the work of preeminent western thinkers like Chaucer, Shakespeare, Galileo, and Caravaggio. J.A. 80. To compliment this "traditional" approach, students at the school are required to take a code of conduct pledge and abide by classical virtues like "prudence, justice, fortitude, and temperance." J.A. 80–81, 111.

The school views its uniform dress code policy as central to this educational philosophy. The school implemented the dress code to "instill discipline and keep order." J.A. 114. The school based this decision on the experience of schools around the country that have successfully reduced behavioral problems with similar policies. *Id.*

Both male and female students must adhere to the dress code. Pet. App. 111–12. All students must wear white or navy-blue tops, which must be tucked in. *Id.* And all students are required to wear khaki or blue bottoms with closed-toed shoes. *Id.* Students must also follow some gender-specific guidelines. *Id.* For example, male students must wear a belt and are forbidden from wearing jewelry. *Id.* at 112.

Furthermore, while male students are required to wear pants or shorts, female students must wear skirts, jumpers, or skorts. *Id.*

Of course, the school drafted the dress code with practicality in mind. Thus, the school allows female students to wear socks or leggings for additional warmth on colder days and waives portions of the dress code on special occasions. *Id.* Additionally, on days with physical education, both male and female students have different uniforms to provide greater freedom of movement. *Id.* Female students, for example, are permitted to wear gym shorts or sweatpants on such days. *Id.* And the school enforces the dress code with a delicate hand. Although the school notifies the parents when a student violates the dress code, this practice is intended to be informative rather than putative. *Id.* Similarly, although a student may be pulled from class to obtain compliant attire, the school has never expelled a student for a uniform policy violation. *Id.*

To be sure, the school is unique. Indeed, the school recognizes that "not all parents and students will be attracted" to their pedagogical methods and educational philosophy. J.A. 111. At first, that prediction proved correct — the school enrolled only 53 students for its inaugural year. J.A. 2716. Over time, however, Brunswick County grew to appreciate the unique educational opportunities provided by the school. Today, the school serves over 900 elementary and middle school students. *Id.* In fact, the school has proven so popular that potential students must apply

through a "lottery" system. *See* J.A. 84–5 (outlining the lottery process).

C. Bonnie Peltier moves to Winnabow, NC to be close to Charter Day, voluntarily enrolls her daughter, and brings the present lawsuit.

In the mid-2010's, Bonnie Peltier decided to move to Winnabow, NC to "be close to [the school]" and take advantage of the school's "unique educational benefits." J.A. 39, Pet. App. 9. So, upon arriving in Winnabow, Peltier voluntarily enrolled her daughter. Pet. App. 61. During an orientation event, Peltier asked about the dress code and school officials directed her to contact the school's founder, Baker Mitchell, for more information. *Id.* Peltier emailed Mitchell, noting that she "underst[ood] the uniform policy and the premise behind it," but asking about the rationale behind the skirts requirement in particular. J.A. 71.

In response, Mitchell highlighted the school's mission to "instill and respect traditional values" in the face of contemporary problems like bullying, sexual harassment, and gun violence. J.A. 70. Mitchell explained the skirts requirement was implemented as part of the dress code to help "establish an environment in which our young men and women treat one another with mutual respect." *Id.* And Mitchell noted that the dress code, including the skirts requirement, had successfully established "a focused learning environment with respectful, dignified student relationships" within the school. *Id.*

Peltier responded by suing the school on her daughter's behalf. J.A. 34–5. Peltier, along with two other parents, challenged the dress code as unlawful under Title IX and the Equal Protection Clause. *Id.* In particular, Peltier alleged the skirts requirement created practical problems for female students including limited mobility, distraction in class, and inadequate warmth. Pet. App. 62. And Peltier expressed concerns about the requirement's psychological ramifications, suggesting that the school was reinforcing antiquated gender stereotypes. *Id.* at 63. The school countered by explaining the pedagogical purpose of the requirement — to promote the classical virtue of chivalry and encourage the proper treatment of young women. *Id.* Furthermore, the school pointed out the extraordinary academic and extracurricular success of their students and credited the dress code, in part, for that success. *Id.*

The District Court for the Eastern District of North Carolina delivered a mixed ruling. *Id.* The district court granted Peltier's summary judgement motion on the Equal Protection claim but granted the school's summary judgement motion on the Title IX claim. *Id.* On appeal, a Fourth Circuit panel reversed the district court's judgement on both claims. *Id.* at 12. However, the 4th Circuit subsequently vacated that decision and considered the appeal en banc. *Id.*

Ultimately, the 4th Circuit affirmed the district court's entry of summary judgement for Peltier on the Equal Protection claim but vacated the entry for the school on the Title IX claim. *Id.* at 7. For the Equal Protection claim, the 4th Circuit held the school had

acted under color of state law. *Id.* at 29, 34. In support, the 4th Circuit stressed the school's 'public' statutory designation. *Id*. at 23–24. Furthermore, the 4th Circuit reasoned that North Carolina had delegated constitutional obligations to Charter Day and that the school had assumed a historically exclusive state function. *Id.* at 22, 26. For the Title IX claim, the 4th Circuit ruled that Title IX unambiguously reaches dress codes. *Id.* at 39, 43. In doing so, the 4th Circuit focused on the text of Title IX without engaging in a Spending Clause analysis. *Id.* at 37–41.

Multiple judges dissented from the 4th Circuit decision. *Id.* at 57, 84. On the Equal Protection claim, Judge Quattlebaum, joined by five judges, criticized the majority opinion for "misconstrue[ing] and ignor[ing] guidance from the Supreme Court and all of our sister circuits" addressing similar issues. *Id.* at 57. Specifically, Judge Quattlebaum argued that the majority failed to follow this Court's decision in *Rendell-Baker v. Kohn*, under which Charter Day could not be considered a state actor. *Id.* at 80–81. Consequently, the 4th Circuit erroneously "transform[ed] all charter schools . . . . into state actors" and severely curtailed the "innovative alternatives to traditional public education envisioned by North Carolina." *Id.* at 57–58.

Judge Wilkinson, joined by two judges, authored an additional dissent on the Title IX claim. *Id.* at 84. Judge Wilkinson highlighted the Department of Education's decades-old guidance finding "no indication" that Congress intended to regulate dress code policies through Title IX. *Id.* at 95–6.

Considering this guidance alongside the statutory text, Wilkinson "struggle[d] to see" how Title IX unambiguously reaches dress codes. *Id.* at 97–98. And Wilkinson viewed this ambiguity as a serious problem, considering the "central concern" of ensuring recipients of federal funds have notice of federally imposed conditions. *Id.* at 96. So, Wilkinson argued that the 4th Circuit's interpretation of Title IX violated the Spending Clause. *Id.* at 100.

SUMMARY OF THE ARGUMENT

Charter Day School did not act under color of state law by implementing the uniform dress code policy. Although the state action inquiry is complex, the Court has provided clear guidance in the school context. Indeed, the Court has stressed that public funding is not dispositive, regulation is insufficient without coercion, and that the activity in question must be the historic, exclusive prerogative of the state. North Carolina did not coerce Charter Day to implement the policy. Further, North Carolina was not the historic, exclusive source of alternative education. Thus, Charter Day is not a state actor.

And the Court should not accept the 4th Circuit's arguments to the contrary. For one thing, North Carolina has not delegated its constitutional obligations to Charter Day. Although North Carolina is constitutionally required to provide a uniform system of free public education, it has not abdicated that responsibility to Charter Day. Additionally, the 4th Circuit improperly relied on Charter Day's statutory designation, an approach which this Court has foreclosed.

Countervailing reasons also weigh against finding state action. North Carolina has a sovereign right to create educational programs outside of direct state control. Furthermore, parents have the inherent right to direct their children's education by choosing independent schools like Charter Day. The Court should not limit North Carolina's sovereign rights, nor parental freedom of choice.

And the Court cannot expand Title IX to prohibit Charter Day's dress code without violating the Spending Clause. Congress cannot condition federal funds unless it does so unambiguously. Here, the regulatory scheme indicates that Title IX does not reach dress codes. Further, the statutory text of Title IX is ambiguous with respect to gender-specific dress codes. Thus, the Court should hold Title IX does not reach Charter Day's policy.

Thus, the judgement of the court of appeals should be reversed.

ARGUMENT

I. Charter Day is not a state actor.

Peltier argues that the school is a state actor subject to liability under § 1983. However, § 1983 does not "regulate private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). Indeed, privately owned corporations are generally not state actors subject to liability under § 1983. *See, e.g.*, *Manhattan Cmty. Access Corp. v.*

Halleck, 139 S. Ct. 1921, 1926 (2019) (private cable provider); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 346, 358–59 (1974) (private utility company). Thus, to win, Peltier must overcome this presumption and demonstrate the school acted "under color of" state law when implementing the uniform dress code policy. *See* 42 U.S.C. § 1983 (establishing the state action requirement).

The Court has recognized limited situations under which a private actor's conduct may be considered state action. To determine if such a situation exists, the Court asks whether "the alleged infringement of federal rights [is] fairly attributable to the State[.]" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (internal quotation marks omitted). Thus, to designate private conduct as state action, the Court must establish a "sufficiently close nexus" between the challenged private conduct and the state. *Jackson*, 419 U.S. at 351.

This inquiry is fact specific and lacks "rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Instead, courts should consider a "range of circumstances" to determine if state action is present. *Id.* For example, this Court has found state action when private actors exercise some power "traditionally [and] exclusively reserved to the State." *Jackson*, 419 U.S. at 352. Alternatively, state action may exist when the government compels or coerces a private entity to take a particular action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Still, the Court is clear that "no one fact can function as a necessary condition across the board

for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood*, 531 U.S. at 295–96.

Despite this analytical flexibility, courts recognize the importance of closely guarding the line between state and private action to "preserv[e] an area of individual freedom by limiting the reach of federal law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). After all, without the state action requirement, "private parties could face constitutional litigation whenever they [rely on state rules]" to guide their behavior. *Id.* at 937. Further, courts use the doctrine to avoid the unfair imposition of responsibility on the state for conduct it could not control. *Id.* at 936. Thus, even when private conduct could arguably be attributed to the state, "countervailing reason[s]" might counsel against exposing a private entity to a § 1983 claim. *Brentwood*, 531 U.S. at 295–96.

Here, the Court should hold Charter Day is not a state actor. First, the Court has established binding precedent in the school context. This precedent demonstrates that Charter Day has not acted under color of law. Next, the 4th Circuit's arguments to the contrary have little merit. Finally, countervailing reasons counsel against finding state action.

A. This Court has provided clear guidance in the school context.

Although the state action doctrine is undeniably complicated, the Court has already established clear and controlling guidance in the school context. In *Rendell Baker v. Kohn*, the Court considered whether

a publicly funded school for students with behavioral problems acted under color of law when discharging certain employees. *Rendell-Baker*, 457 U.S. at 831–32. The school was operated by a board of directors with no public affiliation, received at least 90% of its operating budget from the state, and was subject to extensive state regulation. *Id.* at 831–34. The contacts between the state and the school were extensive — local public school committees referred students, paid their educational costs, and certified their diplomas upon graduation. *Id.* Still, despite these significant contacts with the state, the Court ruled the school was not a state actor. *Id.* at 837.

First, the Court noted that significant public funding is largely unimportant to the state action inquiry. *Id.* at 840–41. The Court drew an analogy between the school and other private organizations that rely on government contracts for their business. *Id.* Like private businesses that negotiate government contracts to build public roads or bridges, the school did not "become [a state actor] by reason of significant or even total engagement in performing public contracts." *Id.* Thus, the Court afforded little weight to the school's significant public funding. *See Id.* And the Court has firmly established this principle in other contexts, too. *See, e.g.*, *Blum*, 457 U.S. at 1011 (publicly funded nursing home); *Polk Cnty. v. Dodson*, 454 U.S. 312, 320–21 (1981) (public defender on state payroll).

Second, the Court stressed that even extensive and detailed regulation of the conduct in question is not sufficient to establish state action — instead, the state

must compel or coerce the conduct. *Rendell-Baker*, 457 U.S. at 841. Although the state heavily regulated the policies of the school, the regulators showed "relatively little interest in the school's personnel matters". *Id.* Thus, since the challenged firings were not "compelled or even influenced by any state regulation," the Court refused to turn the "private management" decisions of a private institution into state action. *Id.* at 841–42. And like the unimportance of public funding, the Court has consistently applied this principle as well. *See, e.g.*, *Jackson*, 419 U.S. at 358–59 (heavily regulated public utility); *Sullivan*, 526 U.S. at 57–58 (heavily regulated private insurers).

Finally, the Court emphasized that the conduct in question must be "traditionally the *exclusive* prerogative of the State" to qualify as state action. *Rendell-Baker*, 457 U.S. at 842 (internal quotation marks omitted) (emphasis in original). In making this determination, the Court has recently admonished against "widen[ing] the lens" on the function in question to "ignor[e] the threshold state-action question." *Halleck*, 139 S. Ct. at 1930. Instead, the Court asks whether the specific function actually provided by the private party was traditionally exclusive to the state. *See Id.* at 1929–30 (defining the function as operating public access channels rather than providing a public forum for speech generally). As such, in *Rendell-Baker*, the Court specified that the school's actual function was to provide "education [to] maladjusted high school students" rather than using

a more general description like providing education. *Rendell-Baker*, 457 U.S. at 842.

And "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (internal quotation marks omitted). In fact, the Court has clearly identified only two — running elections and operating a company town. *See Halleck*, 139 S. Ct. at 1929 (identifying these functions). In contrast, the Court has repeatedly refused to find state action based on a state's past or present performance of some non-exclusive task. *See, e.g.*, *Id.* (collecting cases). Likewise, the Court has consistently refused to equate activities that serve the public in some way with traditionally exclusive state functions. *Id.*

So, in *Rendell-Baker*, the Court dismissed as irrelevant whether the school served the public and asked instead whether the "education of maladjusted high school students" was one of the few historic, exclusive powers of state. *Rendell-Baker*, 457 U.S. at 842. In answering this question, the Court distinguished between the "legislative policy choice" to provide alternative educational opportunities at public expense and historically exclusive state functions. *Id.* Noting that the state had "until recently . . . not undertaken to provide education for students who could not be served by traditional public schools," the Court held that the school could not be considered a state actor. *Id.* at 842–43.

These three principles — that public funding is largely irrelevant, that mere regulation without coercion or compulsion is insufficient, and that only historically exclusive functions are attributable to the state — are clear and well established. In fact, every circuit court to have analyzed whether privately operated schools are state actors have followed the reasoning of *Rendell-Baker*. Pet. App. 67. The First Circuit, for example, rejected a claim that a privately operated school was a state actor, reasoning that "education is not and never has been a function reserved to the state." *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002). The Ninth Circuit reached a similar conclusion, ruling that a public charter school was not a state actor since *Rendell-Baker* "foreclosed" the argument that "public educational services" are traditionally exclusive to the state. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (internal quotation marks omitted). Likewise relying on *Rendell-Baker*, the Third Circuit determined a publicly funded school that educated juvenile sex offenders was not a state actor. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 162, 166 (3d. Cir. 2001) (Alito, J.).

B. Considering this guidance, Charter Day is not a state actor.

With this precedent in mind, the Court should not attribute the school's decision to implement a dress code policy to the state.

At the outset, the Court can largely ignore North Carolina's legislative decision to fund the school's operation. Like the school in *Rendell-Baker*, Charter

Day does not transform into a state actor merely because it relies on government contracts to sustain its business. *See Rendell-Baker*, 457 U.S. at 840–41 (minimizing the importance of state funding).

Similarly, the Court should give North Carolina's regulation of Charter Day little weight. As *Rendell-Baker* demonstrates, North Carolina does not turn private conduct into state action through even "extensive and detailed" regulation — coercion must be shown. *See id.* at 841 (internal quotation marks omitted) (applying the rule). North Carolina takes a hands-off approach towards charter schools like Charter Day, allowing them to design their own curriculums, budgets, and operating procedures without oversight. *See Id.* §§ 115C-218.60, 115C-390.2(a) (requiring, but not supervising, policies); *See also Id.* § 115C-218.10 (exempting from school board rules). Indeed, the state gave Charter Day's private board of directors, which it had no role in selecting, complete authority over whether and how to implement the uniform dress code policy. *See Id.* § 115C-218.15(d) (empowering private boards of directors). So, like the regulators in *Rendell-Baker*, North Carolina has shown "little interest" in the school's dress code. *See Rendell-Baker*, 457 U.S. at 841 (considering state coercion). It strains reason to suggest that North Carolina compelled Charter Day to implement a policy that the state expressly left to the school's discretion.

Finally, the school does not perform a historically exclusive state function. In answering this question, the Court should focus on the specific function

actually provided by the school without "widening the lens" to a high level of generality. *See Halleck*, 139 S. Ct. at 1930 (applying this approach). After all, the Court defined the function at issue in *Rendell-Baker* as educating "maladjusted high school students." *Rendell-Baker*, 457 U.S. at 842. Thus, Charter Day's function must be defined with an eye towards the school's actual role within North Carolina's educational landscape.

Specifically, then, Charter Day provides an alternative education outside of traditional public schools. Through the Charter School Act, North Carolina contracted with the school to "operate independently of" traditional public schools and offer "different and innovative teaching methods." *See* N.C. Gen. Stat. § 115C-218(a)(1), (3) (outlining the Act's goals). Indeed, North Carolina hoped that Charter Day would "provide parents and students with expanded choices" outside traditional public schools. *See Id.* § 115C-218(a)(5) (outlining the Act's goals).

And by the terms of Charter Day's contract, North Carolina does not regulate Charter Day as it does traditional public schools. *Id.* §§ 115C-218.15(a)–(b), (d), 115C-218.10, 115C-218.15(c). Charter Day took advantage of this freedom to build an innovative educational program much unlike what is found within traditional public schools. *See* J.A. 111 (outlining the school's philosophy, methods, and goals). Indeed, traditional public schools do not share Charter Day's focus on classical western values, nor do they enforce policies like the uniform dress code. *Id.* But that's fine — in fact, it's exactly what the

legislature intended when they granted the school's charter. *See* N.C. Gen. Stat. § 115C-218(a)(3) (encouraging independent schools with innovative methods). After all, students are always free to attend a state-operated public school if they wish. *Id.* § 115C-218.45(a)–(b). Charter Day is just another option.

So, Charter Day does not perform a historically exclusive state function. Private actors have taught students outside of North Carolina's traditional public schools for centuries. Private schools, for example, have existed in North Carolina since its earliest days. *See, e.g.*, 1805 N.C. Sess. Law XL (funding a private school). Similarly, parents in North Carolina have long exercised the freedom to homeschool. *See generally Delconte v. State*, 329 S.E.2d 636 (N.C. 1985) (exploring homeschooling in the state). Indeed, the state constitution "specifically envisions that children in [North Carolina] may be educated by means outside of the [traditional] public school system." *Hart v. State*, 774 S.E.2d 281, 293 (N.C. 2015). And, over the years, North Carolina has consistently supported these alternative approaches by funding "educational initiatives outside of [traditional public schools]." *Id.* at 290; *See e.g.*, 1805 N.C. Sess. Law XL (funding a private school); *and see* N.C. Gen. Stat. § 115C-562.1 (allowing eligible students at private schools to receive state funded scholarships).

Families still appreciate this freedom of choice today. In 2020, over 100,000 children in North Carolina attended a private school. Chená T. Flood, N.C. DEP'T ADMIN., *2020 North Carolina Private School Statistics*, 2 (2020), *available at*

https://files.nc.gov/ncdoa/Annual-Conventional-Schools-Stats-Report-2019-2020_1.pdf. Similarly, in in 2022, over 100,000 students were homeschooled. N.C. DEP'T ADMIN., *2022 North Carolina HOME SCHOOL Statistical Summary*, 3 (2022), *available at* https://ncadmin.nc.gov/media/14076/download?attachment. Parents make these choices for a variety of reasons. A Catholic family may choose a religious private school, for example, to ensure their daughter is educated in the tenants of their faith. Or a military family may choose to homeschool their son rather than force him to change schools every time the family relocates. But regardless of why parents choose alternative education for their children, North Carolina has always provided them that choice. The choice to send a child to Charter Day is no different, and no more within the historically exclusive powers of state.

In sum, Charter Day cannot be considered a state actor under the precedents of this Court. Although Charter Day is financially supported by the state, so was the school in *Rendell-Baker*. *See Rendell-Baker*, 457 U.S. at 840–41 (examining state funding). And like *Rendell-Baker*, North Carolina has shown "little interest" in regulating, much less coercing, Charter Day's dress code policy. *See Id.* at 841 (examining regulation). Finally, like the school in *Rendell-Baker*, Charter Day did not assume a historic, exclusive province of state. *See Id.* at 841 (examining the function provided).

C. The 4th Circuit's arguments to the contrary are unconvincing.

The Court should not accept the 4th Circuit's arguments to the contrary. First, the 4th Circuit erred in holding that North Carolina delegated its constitutional obligation to provide free public education to Charter Day. Second, the 4th Circuit emphasized the school's public designation in state law, even though the Court has repeatedly rejected that approach.

In holding that North Carolina delegated its constitutional obligation to Charter Day, the 4th Circuit misapplied *West v. Atkins*. In *West*, the Court recognized a limited exception to the principle that private contractors are generally not state actors. *See West v. Atkins*, 487 U.S. 42, 49–51, 54–56 (1988). The Court held that a doctor who contracted with the state to treat prison inmates acted under color of state law while treating patients. *Id.* at 57–58. The state was required by the Eight Amendment to provide medical care to prisoners. *Id.* at 54. However, the state had fully abdicated this obligation to private contractors, leaving prisoners no choice but to accept the private contractor's care. *Id.* at 54–55. In finding state action, the Court stressed that states cannot delegate duties which they are "constitutionally obligated to provide and leave [their] citizens with no means for vindication of those [constitutional] rights." *Id.* at 56–57, n.14.

North Carolina has not delegated its constitutional obligations in the same way here. To be sure, the North Carolina Constitution requires the state to provide "a general and uniform system of free public schools." N.C. Const. art. IX, § 2, cl. 1. But North

Carolina courts recognize that this constitutional obligation "merely requires that all North Carolina students *have access* to a sound basic education." *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 741 (N.C. Ct. App. 2011) (emphasis added).

North Carolina has not abdicated that obligation by allowing students the option of attending Charter Day. After all, unlike the state in *West*, North Carolina continues to operate a system of state-operated public schools that can, and do, accept any and all students who wish to attend. *See West*, 487 U.S. at 55 (noting the state's wholesale reliance on private contractors). Charter schools, on the other hand, operate "independently of existing schools" to provide students with "expanded choices" for their education. N.C. Gen. Stat. § 115C-218(a), (5). So, rather than delegating constitutional obligations to Charter Day wholesale, North Carolina simply gave students another choice beyond the "traditional public schools that have been establish in order to comply with [the state constitution]." *See Sugar Creek*, 712 S.E.2d at 742 (distinguishing between traditional public schools, which fulfill the state's constitutional obligations, and public charter schools).

And this student choice matters. Unlike the prisoners in *West*, who had no choice but to accept treatment from private contractors, students in North Carolina are never required to attend Charter Day. *See West*, 487 U.S. at 55 ("It is only those physicians . . . to whom the inmate may turn."). In *West*, the Court stressed that the inmates had "no means for vindication of their [constitutional] rights" unless the

private contractors could be held liable under § 1983. *Id.* at 56–57, n.14. Here, on the other hand, students in North Carolina can vindicate their constitutional rights and attend free public school without transforming Charter Day from a private corporation to a state actor. In short, *West* does not suggest that Charter Day is a state actor because no student is required to attend Charter Day and every student may still attend a traditional public school.

Similarly, the 4th Circuit erred in relying upon the school's "public" designation in state law. In fact, this Court has repeatedly rejected similar arguments. In *Jackson*, for example, the Court held that a private utility company was not a state actor despite clear statutory language designating the company as "public." *Jackson*, 419 U.S. at 346, 358–59. And in *Dodson*, the Court emphasized that even though "public" defenders are nominally affiliated with the state, they are not necessarily state actors for the purposes of § 1983. *Dodson*, 454 U.S. at 324–25. Most recently, the Court held a private corporation statutorily required to provide "public access" channels was not a state actor. *Halleck*, 139 S. Ct. at 1926, 1934. With these precedents in mind, the Court should attach little importance to the school's public designation.

Moreover, the 4th Circuit was wrong to claim federalist principles require a focus on Charter Day's statutory designation. To be sure, North Carolina chose to label Charter Day 'public' under state law. N.C. Gen. Stat. § 115C-218.15(a). Still, this Court should recognize that North Carolina "did not intend

for charter schools to be deemed to be agencies or instrumentalities of the State." *State ex rel. Stein v. Kinston Charter Acad.*, 866 S.E.2d 647, 659 (N.C. 2021). North Carolina's linguistic choice must not be misconstrued — the state did not intend to declare Charter Day a state actor.

In short, the 4th Circuit misapplied *West v. Atkins* and improperly relied upon statutory designations. This Court should not sanction the 4th Circuit's misunderstanding.

D. There are countervailing reasons against finding state action.

Finally, the Court should remember that the state action analysis "lack[s] rigid simplicity." *Brentwood*, 531 U.S. at 295. Thus, even when a private entity's conduct might otherwise rise to state action, the Court may decline to expose the entity to constitutional liability when "countervailing reason[s] against attributing activity to the government" exist. *Id.* at 295–96.

The Court cemented this principle in *Dodson*. There, despite significant evidence to the contrary, the Court refused to call a public defender's representation of an indigent client state action. *Dodson*, 454 U.S. at 314–17. The public defender was a full-time employee of the state and was assigned to represent the client during the normal course of employment. *Id.* at 314. Considering these ties, the 8th Circuit determined that the public defender was "'merely a creature of the State'" and found state action. *Id.* at 316. But despite this evidence, the Court

reversed. *Id.* at 317. The Court reasoned that policy considerations, particularly the special role of public defenders within the justice system, counseled against state action. *Id.* at 317–19.

Similar policy considerations exist here. First, the Court should consider the potential effect on our federalist structure. The Court has long acknowledged that federalism "preserves the integrity, dignity, and residual sovereignty" of states. *Bond v. United States*, 564 U.S. 211, 221 (2011) (internal quotation marks omitted). And the Court has identified providing educational programs as central to state sovereignty. *See United States v. Lopez*, 514 U.S. 549, 564 (1995). Here, North Carolina exercised its sovereign power over education by passing the Charter School Act, allowing private corporations to establish independent schools. Yet by calling Charter Day a state actor, the 4th Circuit frustrated North Carolina's sovereign right to create and fund educational programs outside state control. Now, contrary to North Carolina's intent, schools like Charter Day will find their independence over day-to-day decisions stifled by federal demands.

And the 4th Circuit's decision threatens the benefits that North Carolina's citizens gain from our federalist structure. After all, the Court understands that federalism "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (internal quotation marks omitted). Indeed, everyone benefits when states are empowered to serve "as laboratories for experimentation to devise various solutions where the best solution is far from

clear." *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (discussing experimentation in education). Today, students across our nation face an overwhelming array of problems — gun violence, bullying, sexual harassment — without clear solutions. With the Charter School Act, North Carolina addressed these problems by freeing schools like Charter Day to experiment without state interference. Charter Day took that freedom and ran with it, creating an innovative program that is both extremely popular and extremely successful at producing well-adjusted, high-performing students. Of course, North Carolina's experiment benefits those who attend Charter Day. But it also benefits the entire country by testing a novel solution to a national problem. The Court should not threaten the success of this experiment by exposing Charter Day to massive litigation costs.

Finally, the Court should recognize that calling Charter Day a state actor would hurt North Carolina's families most. The Court acknowledges the inherent right of parents "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925). Indeed, the Court has warned against using state power to "standardize" children by limiting parental choice over education. *See Id.* at 535. Simply put, parents know how to raise their own children better than the federal government. In North Carolina, countless families choose Charter Day because of its independence from state control and subsequent freedom to innovate. These families aren't stupid, nor

do they need special protection from the judiciary — Charter Day's approach has proven to be extremely successful, and no child is forced to attend. The Court should not stand in their way.

In sum, the 4th Circuit's reasoning would damage our federalist structure and weaken parental rights. With these considerations in mind, the Court should hold Charter Day did not implement the dress code under color of law.

II. Title IX cannot reach Charter Day's dress code without violating the Spending Clause.

Peltier also alleges that Charter Day violated Title IX by implementing the uniform dress code policy. Title IX prohibits sex discrimination in any "educational program or activity" receiving federal financial assistance. 20 U.S.C. § 1681(a). However, the Court has never clarified whether Title IX regulates gender-specific dress code policies like Charter Day's.

When passing Title IX, Congress invoked the power of the Spending Clause. *See Barnes v. Gorman*, 536 U.S. 181, 185–86 (2002) (interpreting Title IX consistently with Title VI). So, Title IX is like a contract — schools like Charter Day receive federal funds and, in return, agree to comply with Title IX's federally imposed conditions. *See Id.* at 186 (comparing Spending Clause legislation to contracts). But the Court has warned that the very "legitimacy of Congress' power to legislate" under the Spending Clause "rests on whether the recipient voluntarily and knowingly accept[ed] the [contract's] terms." *Id.*

(internal quotation marks and brackets omitted). So, when interpreting Spending Clause legislation like Title IX, the Court considers the "central concern" of "ensuring that the receiving entity of federal funds has notice" of federal conditions. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (internal quotation marks and brackets omitted).

Thus, Charter Day faces Title IX liability only if Congress "unambiguously" conditioned funding on a ban of gender-specific dress codes. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) (plurality) (quoting *Pennhurst*, 451 U.S. at 17) (noting federal conditions cannot be ambiguous). To determine whether Title IX unambiguously reaches gender-specific dress codes, the Court should consider a range of circumstances. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985) (applying to Title I). Specifically, the Court should examine "the legal requirements in place when the grants were made" including "the statutory provisions, regulations, and other guidelines provided by the [Department of Education] at the time." *See Id.* (applying to Title I).

Here, the Court should find Title IX does not reach Charter Day's policy. First, the regulatory scheme has indicated that Title IX does not cover appearance codes for decades. Second, the text of Title IX is ambiguous with respect to gender-specific dress codes.

A. The regulatory scheme indicates that Title IX does not reach dress codes.

At the outset, the Court can consider the "regulations" and "guidelines provided" by the Department of Education at the time Charter Day accepted federal funds. *See Id.* (applying to Title I).

To be sure, in 1975, the Department of Education issued a regulation prohibiting discrimination "against any person in the application of any rules of appearance." 40 Fed. Reg. 24,141 (June 4, 1975). But crucially, the Department decided to withdraw that regulation altogether just seven years later. 47 Fed. Reg. 32,526-27 (July 28, 1982). In fact, when withdrawing the regulation, the Department declared "[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. And the Department was explicit that the "[d]evelopment and enforcement of appearance codes is an issue for local determination." *Id.* at 32,526. The Department is seemingly satisfied with its handiwork— in the forty years since the revocation, the agency has not even attempted to pass another regulation covering dress codes. Pet. App. 99.

And the Department is not alone in believing that the adoption of dress codes "should be left to local discretion." 47 Fed. Reg. 32,527 (July 28, 1982). Indeed, at least twenty other agencies agree. *See* 65 Fed. Reg. 52,859 (Aug. 30, 2000) (adopting the Department's interpretation of Title IX). Furthermore, although the caselaw is inconclusive, courts have suggested that Title IX does not reach

dress codes. *See, e.g.*, *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577–78 (7th Cir. 2014) (collecting cases). So too have numerous legal scholars, each noting that the Department's actions have made it unlikely that Title IX reaches dress code claims. *See, e.g.*, Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol'y 281, 286 (2009); Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 Miss. L.J. 323, 334 (1989).

With this backdrop in mind, Charter Day could not have known that the uniform dress code policy would be threatened by federal conditions. Because Congress charged the Department of Education with implementing and enforcing Title IX, Charter Day examined the Department's guidance when considering whether to accept federal funds. Pet. App. 97. And during this inquiry, the Department of Education was explicit — Charter Day could implement the policy without violating Title IX. The Court should not pull the rug out from underneath schools like Charter Day, who reasonably relied on the clear declarations of a federal regulatory body, by retroactively broadening Title IX.

B. The plain text of Title IX is ambiguous.

The Court can also consider "the statutory provisions" of Title IX. *See Bennett*, 470 U.S. at 670 (applying to Title I). When doing so, the Court should interpret Title IX "in accord with the ordinary public

meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020) (applying to Title VII).

Considering Title IX's statutory language, Charter Day was not clearly notified that federal conditions would restrict the uniform dress code policy. For one thing, Charter Day did not clearly "exclude[]" anyone from nor "den[y]" anyone the benefits of any "educational program" or "activity." *See* 20 U.S.C. § 1681(a). After all, Charter Day offers the same educational programs to both sexes. To be sure, Peltier may argue that female students are excluded from wearing shorts and are therefore denied the benefits of free movement and comfort in the classroom. But wearing shorts is not clearly an "educational program" or "activity," and so Charter Day has not clearly excluded or denied anyone from anything that Title IX unambiguously protects. *See Id.* (not defining those terms).

Furthermore, Charter Day did not clearly "discriminate against" anyone. *See Id.* (defining Title IX's scope). The Court understands the ordinary public meaning of 'discriminate against' to mean "treating [an] individual worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. To be sure, Charter Day asks female students to wear skirts, skorts, or jumpers on most days. Pet. App. 111–12. But male students are similarly restricted, the policy is delicately enforced, and the school frequently waives the policy. *Id.* So, although the policy treats male and female students differently, reasonable minds can disagree as to whether either gender is

treated worse. Indeed, reasonable parents have sent their children to Charter Day without complaint for years. With all this in mind, Charter Day simply had no way to know the policy would be considered discriminatory under Title IX.

In short, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising" schools like Charter Day with retroactive conditions. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (noting this principle). Charter Day reasonably relied upon the regulatory scheme and text of Title IX to determine the uniform dress code policy would not violate federal conditions. The Court should not punish Charter Day for doing so.

CONCLUSION

The judgement of the court of appeals should be reversed.

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October 19, 2022

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Law Review/Journal	**No**
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June 12, 2023

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The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

I am a rising third-year student at Yale Law School interested in a position as a law clerk in your chambers. I am most interested in clerking during the year following my graduation in May 2024, but I would also like to be considered for any openings you may have for 2025 and beyond.

I am originally from Christiansburg, Virginia, and much of my family remains in the state, so I would be thrilled to clerk in Virginia.

My resume, law school transcript, writing sample, and list of references are enclosed. Yale Law School Professors Abbe Gluck, Claire Priest, and Christine Jolls as well as Bessie Dewar are also submitting letters of recommendation on my behalf. I would be happy to provide any additional information you might require. Thank you for your consideration.

Sincerely,

Grace Sullivan

Enclosures

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B.A., Social Studies, *magna cum laude* with Highest Honors, *Phi Beta Kappa*; GPA 3.96

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SELECTED EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP New York, NY

Litigation Summer Associate Summer 2023

Draft sections of brief in New York state court contract dispute between major technology companies; research and write memoranda on foreign sovereign immunities issues in Ninth Circuit appeal.

REPRODUCTIVE RIGHTS AND JUSTICE PROJECT, YALE LAW SCHOOL New Haven, CT

Clinical Student Intern Ongoing

Research and compose memoranda advising national reproductive rights organization on state constitutional abortion litigation; identify plaintiffs and draft complaint to be filed in district court against federal agency regarding alleged discriminatory provision of reproductive health care to LGBT+ couples.

TEMPORARY RESTRAINING ORDER PROJECT, YALE LAW SCHOOL New Haven, CT

Director Ongoing

Mobilize and train 22 volunteers to staff New Haven courthouse's restraining order assistance office; personally assist local residents in completing legal forms and affidavits to seek restraining orders.

JUDGE JEFFREY A. MEYER, U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT New Haven, CT

Intern Fall 2022

Researched and drafted bench memoranda regarding motions for summary judgement in upcoming cases, including employment discrimination case; assisted clerks in revising draft opinions and jury instructions.

MASSACHUSETTS ATTORNEY GENERAL'S OFFICE Boston, MA

Constitutional and Administrative Law Division Intern Summer 2022

Drafted sections of amicus brief on behalf of Massachusetts-led coalition of states for race-conscious admissions case before U.S. Supreme Court; independently authored motions and briefs for state and federal court cases on topics including Eleventh Amendment immunity, housing, and agency authority.

YALE LAW SCHOOL New Haven, CT

Research Assistant Summer 2022

For Professor Doug NeJaime, synthesized legal literature and wrote research memoranda on family law topics like LGBT+ parentage. For Professor Vicki Schultz, researched and edited articles on Title VII.

LEGAL ASSISTANCE CLINIC ON GENDER VIOLENCE, YALE LAW SCHOOL New Haven, CT

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Advocated for indigent New Haven residents suffering from domestic violence in obtaining relief in immigration and family court; conducted fact-finding interviews; filed U-Visa applications.

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		Term Units 14.00 Cum Units 44.00			
Spring 2023					
LAW	21277	Evidence	4.00	H	S. Carter
LAW	21574	NewDevelopmentsinLegislation	2.00	H	A. Gluck
LAW	21601	Administrative Law	4.00	H	N. Parrillo
LAW	30226	ReproductiveRtsJusticeProject	2.00	H	P. Smith, R. Siegel, K. Kraschel
LAW	30229	ReproductiveRtsJusticeProjFldw	2.00	H	P. Smith, R. Siegel, K. Kraschel
		Term Units 14.00 Cum Units 58.00			

IN PROGRESS WORK

Spring 2023					
LAW	21390	ConfrontingAmerica'sConstCrisi	2.00		B. Ackerman
		In Progress Units 2.00			

********** END OF TRANSCRIPT **********

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed.

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

GRACE E. SULLIVAN

grace.sullivan@yale.edu • 410-707-6220 • 262 Willow Street, New Haven, CT 06511

TRANSCRIPT ADDENDUM

Attached you will find my current transcript from Yale Law School. You will notice that my grade for LAW 21390 Confronting America's Constitutional Crisis is not listed. Professor Ackerman has informed me that I received an "H." Once that grade is entered on my transcript, I will provide you with an updated version.

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Grace Sullivan

Dear Judge Walker:

It gives me great pleasure to enthusiastically recommend Grace Sullivan for a clerkship in your chambers. Grace is an elegant writer and brilliant thinker. She is intellectually curious and is a warm and optimistic person. In class, I looked forward to seeing Grace raise her hand, because her comments revealed a stunning capacity to articulate complex connections and themes that lay beneath the surface of our class discussions. It has been an absolute pleasure to have her as a student and to mentor her scholarship. I place her in the top 3% of Yale Law Students. I look forward to working with her as a co-head of the Yale Journal of Law and Humanities. She is a great asset to the school.

Grace was a student in my Fall 2022 Property law course, which I limited to eighteen students and required intensive discussion, an exam, and a research paper. Within a stellar group, Grace stood out as a deeply thoughtful and highly perceptive student who immediately grasped legal ideas and demonstrated a wonderful analytic mind. Her comments, as I mentioned, were simply remarkable. Thus it was no surprise that Grace wrote a fantastic exam for the class, demonstrating her exceptional writing talent.

Much like her wonderful comments in class, Grace wrote a deep and insightful research paper. She compared the shifts in the Supreme Court of the United States's approaches in the areas of compelled speech and takings doctrine. She beautifully articulated how examining these shifts in parallel reveal new insights in each area. I encouraged her to continue working on the paper for publication. For a seminar paper, I was extremely impressed (but not surprised) that she wrote such an eloquent, thoughtful, and original paper. Perhaps more important for a clerkship, Grace's writing record exemplifies her hard work ethic and intelligence.

Grace is one of the most exceptionally talented students I have had in my career. She has exactly the type of skills and work ethic that make her a fantastic candidate for the premier clerkships in the country. Yale Law School, of course, has many excellent students. Grace stands out as being in the elite of those students. I predict that the judge who hires her will be thrilled with the decision.

Sincerely,

Claire Priest
Simeon E. Baldwin Professor
Yale Law School

Claire Priest - claire.priest@yale.edu - 203-432-4851

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

June 12, 2023

The Honorable Judge Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am writing to give my strongest possible support to Grace Sullivan's candidacy for a clerkship in your chambers. In an office with no shortage of bright, hard-working, and collegial interns, Grace stands out as the most outstanding law student with whom I have had the pleasure of working. I am certain you would find her to be a wonderful clerk.

Grace and I worked together in the summer of 2022, after her first year at the Yale Law School, in my role leading the Commonwealth's appellate litigation. At the end of an evaluation form for Grace's work, I included a postscript, which still rings true to me a year later:

> In my 9 years of experience at the AGO, I have never personally been involved in a project where an intern contributed so much superb work to a major project of the office; she contributed as much as any of the 3 AAGs on the brief. Grace's written work was absolutely stellar; she worked with incredible efficiency and responsiveness at all times, totally committed to the project; and she was a pleasure to work with and thoughtful team contributor throughout. If she were ever to apply for a position at the AGO, I would strongly support her candidacy.

Grace worked with me on two different projects, on each of which her work stands out in my mind as exemplary and indeed quite extraordinary.

The first and principal project on which Grace and I collaborated was Massachusetts' amicus brief to the Supreme Court on behalf of 19 states, the District of Columbia, and the Attorney General of Wisconsin in the *Students For Fair Admissions* cases challenging the constitutionality of holistic race-conscious admissions policies in higher education. Over the course of two memoranda in the form of draft briefing, Grace researched and wrote the first draft of the two most important subsections of the brief, setting forth the States' interests in diversity in higher education. She adeptly synthesized evidence from an array of sources, including not only past briefs our office had written in this area but also considerable original research she did herself.

Exceeding our expectations, she managed to achieve what we'd requested: a deep yet concise account of the long-recognized educational benefits of student body diversity generally, followed by illustrative examples of ways in which graduates who have obtained these educational benefits, and graduates with diverse experiences themselves, are important to the States in areas like the medical field and elementary and secondary education. Her work was absolutely beautifully written (on a par with the best writers in our office), meticulously supported with research, and thoughtful in its choices on what to include and not include. Having astonished us with her skills in both research and writing, Grace then became a full-fledged participant in all of the stages of refinement of the draft brief, including completing numerous additional research tasks and substantively cite-checking the brief. Throughout, Grace executed this work with impressive efficiency and speed, while also maintaining seemingly unerring attention to detail and excellent judgment on everything from substantive quandaries to minor matters of polish. Grace also did a wonderful job communicating, always extremely professional and clear via email, which greatly aided the team as we collaborated on the project. Finally, even beyond her stellar written work, Grace contributed materially to the development of the brief through her participation in our team meetings, regularly raising thoughtful questions to consider. She is someone who thinks before she speaks—and, candidly, was an inspiration to me in that regard during the time I had the good fortune to work with her!

After filing that brief, I asked Grace to take on another task in her final week in the office: adapting a multistate amicus brief that Massachusetts had filed in one case for filing in a very similar case filed by the same counsel in another circuit. I asked Grace to take a first crack at adapting the brief to the new case's slightly different facts, procedural posture, and particular arguments, as well as strengthening and deepening the analysis as she saw fit. Grace could not have done a better job: the version she sent me could have been filed as is. She thoughtfully discerned some slight but important differences in how the plaintiffs were casting this case, as opposed to the prior parallel case, and made appropriate adjustments to the brief, including drafting new responsive arguments that were so well done they were retained essentially untouched in the final draft. She also unearthed a wealth of excellent additional sources for one of our arguments. And, as an example of her sound judgment on matters both great and small, she perfectly calibrated the extent of the brief's references to the circuit court's earlier ruling in the case, appropriately deploying the prior opinion in a number of key places, but not so ubiquitously as to risk seeming tiresome or obsequious. The whole thing was superbly written throughout—and produced entirely independently after just one initial conversation.

In sum, Grace's outstanding work last summer leaves me certain that she would make valuable contributions as a law clerk in your chambers. On a personal note, she is also an extremely thoughtful, considerate, nice person with whom to work. I recommend her without qualification. Please do not hesitate to reach out if I can help in any way as you consider her candidacy.

Yours sincerely,

Elizabeth N. Dewar
State Solicitor
(617) 963-2204
bessie.dewar@mass.gov

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Grace Sullivan, an extraordinary Yale Law School student and Phi Beta Kappa graduate of Harvard University, for a clerkship in your chambers. Grace wrote a jaw-droppingly good paper in Employment and Labor Law with me, and I recommend to you with the greatest possible enthusiasm.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

I met Grace when she took Employment and Labor Law with me the spring of her first year of law school. Grace was absolutely outstanding throughout the semester in responding to cold-call questions. What was truly extraordinary, however, was her end-of-term paper. To talk about this paper, I will make an analogy to classical music. One can listen to many players of an instrument such as violin and enjoy hearing these players, but then there are those occasional players who, it's clear with a few seconds of the bow hitting the strings, are just doing something completely different from what everyone else is doing. I had exactly this reaction to Grace's paper. The ideas, the command, the writing – the paper was one of the most memorable pieces of student writing I have read in at least a decade. She is a stunningly bright and talented person. Each of the two times I have posted announcements for research assistants since meeting Grace, I have hoped to find her among the applicants; unfortunately this hasn't happened yet, but I will keep hoping!

In sum, Grace is a truly brilliant thinker and writer whom I recommend to you with the greatest possible enthusiasm. I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of her application.

Sincerely,

Christine Jolls
Gordon Bradford Tweedy Professor
Yale Law School
christine.jolls@yale.edu
(203) 432-1958

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write a letter for Grace Sullivan, Yale Law School Class of 2024, for a clerkship in your chambers. Grace was a standout student in three courses I have taught—all extremely large and competitive: Civil Procedure, Legislation, and an Advanced Statutory Interpretation course I debuted this year, which covered the many recent changes at the Court.

This year I have moved to a shorter-letter format than usual; I have heard judges appreciate this. Please do not take my attempt at brevity to indicate any lack of complete enthusiasm for the candidate. I would be glad to talk about more about Grace over email (abbe.gluck@yale.edu) or telephone (917 287 0013) anytime.

Grace was a top scorer on the exam in the first two courses she took with me. In my most recent course, she wrote a fantastic paper about the justifications for textualism, and how those justifications have changed from Justice Scalia to Gorsuch, and how they are incomplete. She is a wonderful thinker, researcher and writer. She also was relentlessly prepared for this course, which had an extremely heavy (400+ page) weekly reading load.

Grace went to Harvard for undergrad. At Yale, she directs our Temporary Restraining Order Project, is editor in chief of the Yale Journal of Law and the Humanities, and a two-time semifinalist in Barristers Mock Trial. She is also the Academics Chair of Outlaws, YLS's LBGTQ student group.

She's interested in working in government as a litigator after law school, and particularly excited about working for a state Attorney General; she spent a summer at the Massachusetts AG office in the office of the Solicitor and absolutely loved the work. She has a near-perfect transcript with a very rigorous course load.

Grace is also an enthusiastic and unassuming person, who speaks her mind but also is a great listener and team player. I think she will be a terrific law clerk and she is sincerely passionate about practicing appellate law for the rest of her career.

Please do not hesitate to contact me to talk further about her. Thank you so much for considering her.

Sincerely,

Abbe R. Gluck
Alfred M. Rankin Professor of Law and
Faculty Director, Solomon Center for Health Law and Policy, Yale Law School
Professor of Medicine, Yale School of Medicine

GRACE E. SULLIVAN

grace.sullivan@yale.edu • 410-707-6220 • 262 Willow Street, New Haven, CT 06511

WRITING SAMPLE

The attached writing sample is an excerpt from a brief I wrote and submitted for the Morris Tyler Moot Court of Appeals competition. The case was *303 Creative v. Elenis*. In the case, a would-be wedding website designer who refused to create wedding websites for same-sex weddings sought to prevent Colorado's public accommodations law from applying to her work. The competition problem differed somewhat from the actual case pending before the United States Supreme Court, and competitors were not permitted to rely on materials submitted to the Court.

The question presented for the competition was: whether applying a public accommodations law to compel an artist to speak violates the Free Speech Clause of the First Amendment.

I was assigned to represent the petitioners, 303 Creative and Lorie Smith. For this sample, I chose excerpts from the section of the brief addressing the First Amendment's coverage of Ms. Smith's wedding websites. Later in the brief, I analyzed arguments applying strict scrutiny.

This writing sample has not been edited by anyone other than myself.

SUMMARY OF ARGUMENT

I. Applying a public accommodations law to compel an artist to speak violates the Free Speech Clause of the First Amendment. The creation of unique wedding websites to celebrate a couple's marriage is artistic expression and therefore pure speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S 557, 569 (1995).

As applied to Ms. Smith, Colorado's Anti-Discrimination Act (CADA) compels speech by forcing Ms. Smith to affirm a position in support of same-sex marriage that violates Ms. Smith's religious views. Moreover, CADA targets Ms. Smith's message because Colorado disagrees with the content of that message. Content-based regulation of speech and compelled speech are both presumptively unconstitutional. *See Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988).

II. Because applying CADA to Ms. Smith would compel Ms. Smith to speak against her beliefs and regulate pure speech based on its content, strict scrutiny applies. *Riley*, 487 U.S. at 795. Public accommodations laws generally advance a compelling governmental interest in reducing discriminatory conduct. However, where speech itself becomes the accommodation, applying public accommodations laws to compel such speech cannot survive strict scrutiny. *Hurley*, 515 U.S. at 572. Applying CADA to Ms. Smith's speech would serve an improper governmental interest in purging unpopular viewpoints. Limiting the reach of public accommodations laws to conduct is a more narrowly tailored approach that could ensure equal access to public accommodations without burdening speech. Thus, applying CADA to Ms. Smith is not "narrowly tailored to serve compelling state interests" and is, therefore, unconstitutional. *Nat'l Inst. of Fam. and Life Advocs.*, 138 S. Ct. at 2371.

ARGUMENT

This case can be straightforwardly resolved by applying *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*. In *Hurley*, this Court unanimously held that a public accommodations law could not be applied to compel St. Patrick's Day parade organizers to include an LGBTQ+ contingent of marchers in their parade where the parade organizers opposed the LGBTQ+ marchers' message. 515 U.S. at 578. This Court found that expressive events like parades are speech, that compelling an entity to host the speech of another entity can be unconstitutional compelled speech, and that these principles do not change because a public accommodations law is involved. *Id*. at 573-80. While public accommodations laws serve compelling governmental interests when regulating conduct in order to ensure equal access to public accommodations, the government may not declare "speech itself to be the accommodation." *Id.* at 572.

I. The First Amendment protects Ms. Smith's artistic speech against being compelled based on its content.

A. Ms. Smith's websites are artistic speech covered by the First Amendment.

Ms. Smith's wedding websites are speech. This is so both because wedding websites in general are artistic mediums for expressing ideas, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), and because Ms. Smith's websites in particular use text, graphics, and other design tools to convey a message about Christian marriage, *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

Ms. Smith's websites are speech because wedding websites are an artistic medium embraced by the First Amendment. As art and technology have evolved, the First Amendment has come to recognize many "significant medi[a] for the communication of ideas." *Joseph Burstyn, Inc.*, 343 U.S. at 501. These media include "pictures, films, paintings, drawings, and engravings"

as well as "oral utterances and the printed word." *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). The "custom text, graphics, and other media" Ms. Smith uses to "celebrate and promote [a] couple's wedding and unique love story" fit among these other forms of speech. *303 Creative, LLC v. Elenis*, 6 F.4th 1160, 1176 (10th Cir. 2021). That Ms. Smith's expressive words and designs appear on a website rather than in the pages of a novel or on the walls of a museum does not matter. This Court has already concluded that websites receive First Amendment coverage. *Reno v. ACLU*, 521 U.S. 844, 869-70 (1997). Thus, Ms. Smith's websites are protected by the First Amendment because they are akin to the other media this Court has recognized as protected speech.

Ms. Smith's websites also satisfy other tests of First Amendment coverage that focus on the First Amendment value of expression. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Justice Thomas's concurrence suggested that to discern the First Amendment's reach, courts should apply the *Spence* test which looks for "an intent to convey a particularized message" and "surrounding circumstances" in which "the likelihood was great that the message would be understood by those who viewed it." 138 S. Ct. 1719, 1742 (2018) (Thomas, J., concurring in part) (citing *Spence*, 418 U.S. at 410-11). Justice Thomas explained further that this test is not necessary where pure speech is concerned. *Id.* In *Hurley*, the Court also found that a "particularized message" cannot be required where artistic expression is involved; if it were, the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock . . . or Jabberwocky verse of Lewis Carroll." 515 U.S at 569. Like paintings and poems, Ms. Smith's websites are pieces of art that combine text and images and are, therefore, pure speech. Under both Justice Thomas's concurrence in *Masterpiece Cakeshop* and the Court's decision in *Hurley*, Ms. Smith's websites should be covered whether or not they include a "particularized message" due to their pedigree as pure speech. Nevertheless, Ms. Smith does also convey a

particularized message in each of her creations about the couple's love story and about Biblical marriage. Thus, Ms. Smith's art is protected by the First Amendment because she communicates ideas through expressive tools likely to convey her meaning to an audience.

Courts across the country have found that weddings are especially full of opportunities for speech and expression. In *Telescope Media Group v. Lucero*, the Eighth Circuit held that wedding videography is speech. 936 F.3d 740, 751-52 (8th Cir. 2019). In *Brush & Nib Studio, LC v. City of Phoenix*, the Supreme Court of Arizona found that custom wedding invitations are pure speech. 448 P.3d 890, 908 (Ariz. 2019). And in *Chelsey Nelson Photography v. Louisville/Jefferson County Metro Government*, the Western District of Kentucky held that wedding photography is speech. 479 F. Supp. 3d 543, 557-58 (W.D. Ky. 2020). Because custom wedding websites are equally as expressive as wedding photography, invitations, and videography, this Court should follow the national trend of recognizing weddings as expressive events that can bring together many kinds of speakers.

Because Ms. Smith personalizes her wedding websites for each couple, her wedding websites are speech, not mere goods or services. Although the case was not ultimately decided on Free Speech grounds, in *Masterpiece Cakeshop*, Justice Kennedy's majority opinion distinguished between off-the-shelf products and bespoke creations. He noted, "If a baker refused to design a special cake with words or images celebrating the marriage . . . that might be different from a refusal to sell any cake at all." *Masterpiece Cakeshop*, 138 S. Ct. at 1723. Justice Kennedy thereby implied that bespoke products can be art meriting First Amendment protection even where their off-the-shelf equivalents are ordinary goods. Because Ms. Smith's creations are always custom-made to reflect the particular couple and Ms. Smith's own message, Ms. Smith's websites are

speech meriting special protection regardless of what this Court might decide as to the provision of non-artistic, mass-produced goods and services.

The fact that website design is done for profit on behalf of clients is immaterial to its First Amendment coverage. That 303 Creative is a business operated for profit does not change the status of its wedding websites as speech. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8, 16 (1986); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (placing "beyond serious dispute" the notion that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit"). Were it otherwise, artists of all kinds as well as journalists, writers, politicians, and professors would have to choose between First Amendment protections and their livelihood.

That third-parties request 303 Creative's services is also irrelevant to whether the wedding websites Ms. Smith creates are her own artistic speech. Ms. Smith's speech is implicated in everything she creates. This Court has recognized as much in cases more attenuated than this one. In *Hurley*, this Court recognized that the parade organizer's speech was at stake where third-party marchers would be generating their own messages to be included within the broader message of the parade. 515 U.S. at 569-70. As the Tenth Circuit found, "The speech element is even clearer here than in *Hurley* because [Ms. Smith and 303 Creative] actively create each website, rather than merely hosting customer-generated content." *303 Creative*, 6 F.4th at 1177; *see also Mia. Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.").

Whether a visitor to a website produced by 303 Creative would attribute the website's content to Ms. Smith or to a customer couple also does not matter. The Court in *Hurley* rejected arguments that the parade marchers' views could be distinguished from the organizers' views or

disclaimed by the organizers. Such "protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 575-76. Here too, Ms. Smith cannot be compelled to create websites celebrating same-sex marriage with the consolation that she may cross her fingers behind her back.

There can be no doubt that Ms. Smith's art is speech covered by the First Amendment. Any attempt to regulate or compel Ms. Smith's speech is therefore subject to strict scrutiny. *Riley*, 487 U.S. at 795; *Masterpiece Cakeshop*, 138 S. Ct. at 1746 (Thomas, J., concurring in part).

B. Applying CADA to Ms. Smith would compel her to speak in violation of her beliefs.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Compelling speech may be even more odious to the Constitution than restraining speech because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). Here, applying CADA to Ms. Smith would compel her to speak out in favor of same-sex marriage despite her contrary religious beliefs. This violates Ms. Smith's First Amendment right to "refrain from speaking" on the issue of same-sex marriage while continuing to express her own views about Christianity and marriage. *Wooley*, 430 U.S. at 714.

Compelling a speaker to host speech with which she disagrees is compelled speech. *Hurley*, 515 U.S. at 572–73, 581. "[C]ompelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 63 (2006). Compelled speech exists when "the

complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* Accommodating same-sex wedding websites would change Ms. Smith's message from a message about religious marriage to a message endorsing same-sex marriage. Applying CADA to Ms. Smith would thus violate her First Amendment right against compelled speech.

Although the compelled hosting of speech is itself impermissible compelled speech, Ms. Smith should be entitled to additional protection because she does more than host the speech of her clients. Ms. Smith closely "collaborate[s] with prospective brides and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design for marriage." *303 Creative*, 6 F.4th at 1197 (Tymkovich, C.J., dissenting). In contrast, the parade organizers in *Hurley* were in no danger of being compelled personally to paint banners or design costumes for the would-be marchers. This case is, therefore, a straightforward application of *Hurley* to circumstances which more clearly implicate the First Amendment. Applying CADA to Ms. Smith's collaborative creative process would force her to expend effort and artistic talent personally while acting as a mouthpiece for a viewpoint she opposes. This dynamic is precisely the kind of "demeaning" degradation of autonomy this Court has found the First Amendment's compelled speech doctrine must protects against. *Janus*, 138 S. Ct. at 2464

Where this Court has found the elements of compelled speech to be missing, it has been in the absence of the expressive artistic meaning characteristic of Ms. Smith's speech. In *Rumsfeld v. FAIR*, the Court considered whether the Solomon Amendment compelled speech by requiring law schools to accommodate military recruiters in their facilities. 547 U.S. at 64. The Court concluded that the recruiters' message did not alter the schools' speech because the decision to

permit recruiters on campus "is not inherently expressive." *Id.* In *Pruneyard Shopping Center v. Robins*, the Court similarly found that a shopping mall's right not to be compelled to speak was not violated merely because state law required the mall to allow handbillers access to public spaces. 447 U.S. 74, 87 (1980). The *Pruneyard* Court explained that there was no compelled speech because "no specific message" was "dictated by the State to be displayed." *Id.* In Ms. Smith's case, inherently expressive messages about religion and marriage are communicated with every artistic creation, and Ms. Smith is not being asked merely to allow access to physical space but rather to deploy her own creative talents to accommodate a "specific message" endorsing same-sex marriage. *Id.* Therefore, the narrow exception to compelled speech doctrine for non-expressive, physical hosting carved out in *FAIR* and *Pruneyard* does not apply in this case. Instead, compelling Ms. Smith's speech under CADA presumptively violates the First Amendment unless it can survive strict scrutiny. *Riley*, 487 U.S. at 795.

C. Applying CADA to Ms. Smith would regulate speech based on its content.

The Supreme Court has announced a "prohibition against content discrimination" because content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992); *see also Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371. As the *Hurley* Court put it, "[T]he fundamental rule of protection under the First Amendment" is "that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. Here, Ms. Smith is being prevented from choosing the content of her message favoring a religious view of marriage.

By applying CADA, Colorado would control Ms. Smith's choice whether to propound a message approving same-sex marriage. Ms. Smith's message in this case is somewhat similar to the parade organizers' message in *Hurley* that opposed "unqualified social acceptance" of

LGBTQ+ people. 515 U.S. at 574-75. In *Hurley*, the Court protected the parade organizer's message from content-based regulation under Massachusetts public accommodations law because "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Id.* Here, as in *Hurley*, the government has applied a public accommodations law to attempt to control speech the government itself finds to be objectionably discriminatory. *Id.* at 579. Unlike in *Hurley*, however, Ms. Smith does not wish to express a message that LGBTQ+ people should never be socially accepted. Her message is simply that same-sex marriages do not comport with her own Christian view of marriage. Because it is for Ms. Smith, and not for the state of Colorado, to decide what her views on marriage should be, applying CADA to Ms. Smith would target her speech based on its content.

Applying CADA to Ms. Smith would discriminate based on content despite CADA's facially neutral regulation of conduct. A law is content-based "if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). On its face, CADA's Accommodation Clause is not a content-based restriction of speech but a prohibition of discriminatory conduct. However, this Court has found that where a law "generally functions as a regulation of conduct," it may nevertheless impermissibly discriminate based on content where "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26-28 (2010) (finding that a facially content-neutral statute was content-based as applied and therefore triggered strict First Amendment scrutiny); *see also Brush & Nib*, 448 P.3d at 914 (finding an Arizona public accommodations law to be facially neutral, but nevertheless operative as a content-based restriction). Here, the "conduct triggering coverage" is Ms. Smith's attempt to "communicat[e] a message" about her religious view of marriage. Therefore, applying CADA to Ms. Smith would

target her message because of its content. Content-based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat'l Inst. of Fam. and Life Advocs.*, 138 S. Ct. at 2371.

***

CONCLUSION

We respectfully request that the Tenth Circuit's judgement be reversed.

Respectfully submitted,

GRACE SULLIVAN

Applicant Details

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Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year law student at the University of Pennsylvania Carey Law School, and I am writing because I am interested in being considered for a 2024-2025 clerkship in your chambers. As someone with ambitions to pursue a varied career path, I feel an affinity toward your background in both the public and private sectors and am eager to learn from you.

Since coming to the United States as a child and having to learn English largely on my own, my relationship to writing has been somewhat complicated: to this day, it remains a very careful, iterative, frankly artificial process.

Despite this, I have found over the years that writing can in fact be an empowering and powerful tool. In many respects, my complicated relationship to it has been a boon. Having to communicate in a careful, deliberate way has helped me develop a sensitivity to the mechanics of building complex ideas with precise vocabulary. Long-form research projects such as my law review Comment have strengthened focus and clarity in my writing, while short-form projects such as my exhibition writing have improved my brevity and creativity.

This is not to say I must work slowly or independently. In all my professional experiences, I have balanced meeting deadlines with paying close attention to detail as well as individual projects with collaborative ones. I learned so much about writing both individually and as a team in Judge Mehta's chambers last summer and am looking forward to doing more of the same for the rest of my legal career.

My résumé, transcript, writing sample, and letters of recommendation from Professor Kermit Roosevelt, Professor David Hoffman, and Incoming Dean Sophia Lee are enclosed. Please let me know if any other information would be useful. Thank you for your time and consideration.

Respectfully,

J. Anes Sung

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EDUCATION

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, Philadelphia, PA
J.D., expected May 2024
Honors: *University of Pennsylvania Law Review*, Vol. 172, Executive Editor
Littleton Fellow, 2023-2024 (Legal Research and Writing Instructor)
Activities: Transgender Empowerment & Advocacy, Research Director
Penn Law Lambda, Communications Director

COLUMBIA UNIVERSITY, New York, NY
M.A., Modern and Contemporary Art: Critical and Curatorial Studies May 2019
Thesis: "In the Shadow of Forward Motion: Death and the Compulsions of the Photographic Image in the Photography of David Wojnarowicz, 1987-1991"
Honors: Semifinalist, GSAS Master's SynThesis Competition

HARVARD UNIVERSITY, Cambridge, MA
A.B., History of Art and Architecture (Modern and Contemporary) May 2016
Honors: Rachel Mellinger Memorial Award
Harvard-Cambridge Summer Fellowship
Artist Development Fellowship
Activities: Harvard-Radcliffe Orchestra
Signet Society

EXPERIENCE

WILMERHALE, Washington, D.C.
Summer Associate May - July 2023
Conduct legal research and draft memorandum on circuit splits to support Appellate & Supreme Court Litigation group; draft brief for pro bono BVA appeal

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, Philadelphia, PA
Teaching Assistant to Professor Sophia Lee January - May 2023
Supported Administrative Law course by designing quizzes, organizing informal conversations with practitioners of administrative law, and supporting students
Research Assistant to Professor David Hoffman February - September 2022
Researched the effect of commute time to court on default evictions in Philadelphia

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Washington, D.C.
Judicial Intern for the Honorable Amit P. Mehta May - July 2022
Drafted and revised opinions, conducted legal research, wrote memoranda, and verified citations in collaboration with clerks for cases on Judge Mehta's docket

ESPAÑOLA PUBLIC SCHOOLS, Española, NM
Fifth Grade Teacher, Eutimio "Tim" Salazar III Elementary School 2019 - 2021
Taught fifth-grade Common Core State Standard-aligned lessons in all subjects

WHITNEY MUSEUM OF AMERICAN ART, New York, NY
Curatorial Research Assistant for the Office of the Chief Curator 2018 - 2019
Evaluated and catalogued work for *Jasper Johns: Mind/Mirror* (2021), wrote exhibition descriptions, researched archives, and supported publication development

PUBLICATION

Commentary for "Labor" and "Idea" in *Drawing: The Invention of a Modern Medium* (2017): https://harvardartmuseums.org/tour/drawing-the-invention-of-a-modern-medium

INTERESTS

Attend operas. Hear chamber music. Throw dinner parties. Quilt.